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AN ANALYSIS OF THE RIGHTS AND DUTIES OF THE HOLDER OF THE EXECUTIVE RIGHT

Joel Blass and Jean Rand Richey

LET'S ABOLISH THE "FOUND-DEAD" PRESUMPTION

Wade H. Lagrone

THOUGHTS OF A PLAINTIFF'S LAWYER

Francis S. Bowling

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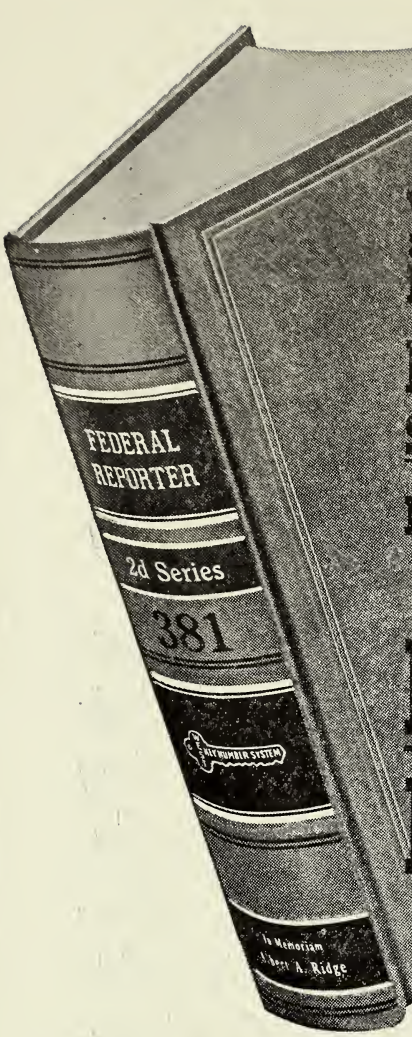

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AN ANALYSIS OF THE RIGHTS AND DUTIES OF THE HOLDER OF THE EXECUTIVE RIGHT

Joel Blass and Jean Rand Richey***

I

General Characteristics of the Executive Right

The executive right is well recognized in the oil industry to mean the exclusive power to execute oil and gas leases.[1] It is created by grant

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[1] 2 H. Williams & C. Meyers, Oil and Gas Law §§ 338-39.3 (1968) [hereinafter cited as Williams & Meyers]. *See generally* 1 E. Kuntz, Oil & Gas §§ 15.3, 15.4, 15.7 (1962) [hereinafter cited as Kuntz]; R. Myers, The Law of Pooling and Unitization (2d ed. 1967) [hereinafter cited as Myers]; Elliott, *The Executive Right*, 42 Texas L. Rev. 865 (1964) [hereinafter cited as Elliott]; Everett, *The Exclusive Power of One to Lease A Mineral Interest of Another: The Executive Right to Lease*, 3 Rocky Mt. Min. L. Inst. 509 (1957) [hereinafter cited as Everett]; Hoffman, *Legal Problems in Pooling, Unitization, and Joint Operation of Oil and Gas Interests*, 11 Oil & Gas Inst. 331 (Sw. Legal Fdn. 1960); Hoffman, *Some Problems in Pooling and Unitization*, 7 Oil & Gas Inst. 219 (Sw. Legal Fdn. 1956) [hereinafter cited as Hoffman, *Some Problems*]; Jones, *Exercise of Executive Rights in Connection with Non-Participating Royalty and Non-Executive Mineral Interests*, 15 Oil & Gas Inst. 35 (Sw. Legal Fdn. 1964) [hereinafter cited as Jones, *Executive Rights*]; Jones, *Non-Participating Royalty*, 26 Texas L. Rev. 569 (1948) [hereinafter cited as Jones, *Non-Participating Royalty*]; Jones, *Problems Presented by the Separation of the Exclusive Leasing Power from the Ownership of Land, Minerals, or Royalty*, 2 Oil & Gas Inst. 271 (Sw. Legal Fdn. 1951) [hereinafter cited as Jones, *Problems*]; Lustgarten & Olpin, *Safeguarding Non-Leasing Oil and Gas Interests Derived from the Landowner*, 38 Texas L. Rev. 550 (1960); Martz & Hames, *Implied Rights of Royalty Owners*, 3 Rocky Mt. Min. L. Inst. 195 (1957) [hereinafter cited as Martz]; Morris, *Some Legal Consequences Resulting from a Separation of the Incidents of Ownership of a Mineral Interest*, 7

or reservation of a non-participating royalty or a non-executive mineral interest in oil and gas.[2] These may be created either prior or subsequent to a lease of the land for oil and gas purposes, with the exclusive leasing power or "executive right" remaining in the mineral fee owner or being transferred to another.[3] It is well established in Mississippi, which is an "ownership-in-place" state, that grantors and grantees in oil, gas and mineral deeds may separate in their conveyances the several interests constituting a mineral estate, but a deed conveying minerals in place carries along with it royalty rights in the land unless expressly excepted.[4] "Royalty" and "minerals in place" have been recognized as separate and distinct estates.[5] The use of the term "profits" in a reservation has been construed as "non-participating royalty" only.[6]

As its name suggests, the holder of a non-executive mineral interest has fee title to an undivided interest in minerals but lacks the executive right and, according to the better view, the development right. A non-executive mineral interest has been defined as "the right to royalty and to either bonus or rental or both, under existing or future leases, the owner of which has no development right and no executive right, i.e., no right to exploit the minerals himself and no right to join in the execution of leases."[7] Professors Williams and Meyers regard a non-executive mineral interest as substantially a grant of royalty, the only

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OKLA. L. REV. 285 (1954); Williams, *The Fiduciary Principle of the Law of Oil and Gas*, 13 OIL & GAS INST. 201 (Sw. Legal Fdn. 1962) [hereinafter cited as Williams, *Fiduciary Principle*]; Williams, *Stare Decisis and the Pooling of Non-Executive Interests in Oil and Gas*, 46 TEXAS L. REV. 1013 (1968) [hereinafter cited as Williams, *Stare Decisis*]; Williams & Meyers, *The Impact of Pooling and Unitization on Term Interests in Oil and Gas*, 11 Sw. L.J. 399 (1957) [hereinafter cited as Williams & Meyers, *Impact of Pooling*]; Comment, *Symposium on Oil and Gas Unitization—The Nature of Unitized Title*, 10 Sw. L.J. 146 (1956).

[2] WILLIAMS & MEYERS, *supra* note 1, § 338.

[3] Armstrong v. Bell, 199 Miss. 29, 24 So. 2d 10 (1945); Jones, *Problems*, *supra* note 1, at 291.

[4] Ford v. Jones, 226 Miss. 716, 85 So. 2d 215 (1956).

[5] Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955); Palmer v. Crews, 203 Miss. 806, 35 So. 2d 430 (1948).

[6] Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952); Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So. 2d 516 (1947).

[7] 1 WILLIAMS & MEYERS, *supra* note 1, § 301, at 441. This definition was adopted by the Mississippi Supreme Court in Harris v. Griffith, 210 So. 2d 629, 634 (Miss 1968), in which the court, citing 1 WILLIAMS & MEYERS, *supra* note 1, § 301, at 441 (1964), stated:

> A non-participating mineral interest is in substance a royalty interest. This deed does not create a non-executive mineral interest, which is defined as the right to royalty and to either bonus or rental, or both, under existing or future leases, the owner of which has no development right and no executive right. Bonus or rental in the present deed were not conveyed.

difference being the addition of bonus and rental to royalty.[8] A non-executive interest usually is used where a grantor wishes to create fractional mineral interests but wishes to provide that only one party will have the executive and development rights in order to facilitate development.[9] In view of the tendency of the courts to construe, under the "four-corners" doctrine,[10] an apparent mineral interest which has been stripped of bonus, delay rentals, and executive right to lease, as a non-participating royalty rather than a non-executive mineral interest, one who wishes to draft an instrument creating the latter should be especially explicit as to what he is creating.[11]

The characteristics of a non-participating royalty have long been well known in the oil industry.[12] The Mississippi Supreme Court in *Mounger v. Pittman*[13] distinguished a non-participating royalty interest from a mineral interest[14] as follows:

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[8] 1 KUNTZ, *supra* note 1, § 15.3, at 343, § 15.7, at 350-51; 2 WILLIAMS & MEYERS, *supra* note 1, § 338; Williams & Meyers, *Impact of Pooling*, *supra* note 1, at 401-02. *But see* Jones, *Executive Rights*, *supra* note 1, at 40, defining this interest as follows:

> A non-executive mineral interest may, therefore, be defined as a mineral fee interest which has been stripped of only one of its many natural attributes, *i.e.*, the power to lease; and it will be demonstrated that the creation of such non-executive mineral interest results in or brings about a cotenancy in the mineral fee estate even in those rare instances where the mineral fee interest has also been stripped of bonuses are delay rentals, or both.

[9] 1 WILLIAMS AND MEYERS, *supra* note 1, § 301, at 441. *See* Superior Oil Co. v. Stanolind Oil & Gas Co., 150 Tex. 317, 240 S.W.2d 281 (1951), holding that the power to lease is exclusive and an attempt by the non-executive mineral interest owner to lease his interest was a nullity.

[10] Under this rule, an instrument is construed as a whole, in order to ascertain the intention of the parties; thus, particular words, phrases, clauses, or sentences in a reservation or deed do not necessarily determine the type of estate created.

[11] Rogers v. Morgan, 250 Miss. 9, 164 So. 2d 480 (1964), construing an instrument to be a grant of a 1/16 non-participating royalty, has been critized on the ground that the deed "was clear and unambiguous, and that it created an undivided 1/2 non-executive mineral interest with no right to share in bonus or rental." 1 WILLIAMS & MEYERS, *supra* note 1, § 304.10, at 131 (Supp. 1968). *See also* Texas Gulf Prod. Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447 (1953).

[12] Jones, *Non-Participating Royalty*, *supra* note 1:

> Non-Participating Royalty has a well-understood meaning in the oil industry. It may be defined as an interest in the gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under oil, gas, and mineral leases executed by the owner of the mineral fee estate. The exclusive leasing privilege remaining in the mineral fee owner is commonly referred to and known as the "executive right." *Id.*

[13] 235 Miss. 85, 108 So. 2d 565 (1959).

[14] For Mississippi cases distinguishing between mineral and royalty interests, see Mounger v. Pittman, 235 Miss. 85, 108 So. 2d 565 (1959); King v. Childress, 232 Miss. 766, 100 So. 2d 578 (1958); Ford v. Jones, 226 Miss. 716, 85 So. 2d 215 (1956); Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955); Texas Gulf Prod. Co. v. Griffith,

> The distinguishing characteristics of a non-participating royalty interest are: (1) Such share of production is not chargeable with any costs of discovery and production;[15] (2) the owner has no right to do any act or thing to discover and produce the oil and gas;[16] (3) the owner has no right to grant leases;[17] and (4) the owner has no right to receive bonuses or delay rentals.[18] Conversely, the distinguishing characteristics of an interest in minerals in place are: (1) Such interest is not free of cost of discovery and production; (2) the owner has the right to do any and all acts necessary to discover and produce oil and gas; (3) the owner has the right to grant leases; (4) the owner has the right to receive bonuses and delay rentals.[19]

One writer's[20] comments concerning the nature of such a royalty interest in Texas are also pertinent to the situation in Mississippi, since both states follow the ownership-in-place doctrine:

> It should be borne in mind that the owner of a mere royalty interest has no present or prospective possessory interest in the land; that he owns no part of the minerals (as such) in place; that he does not become a cotenant in the mineral estate; that he cannot, therefore, demand or be forced into an involuntary partition of the mineral fee estate; and that his interest is merely a present vested incorporeal interest in the land.

While the royalty owner is entitled to receive, free of cost, his proportionate share of the oil, gas or other minerals when and if produced (which is the chief distinguishing characteristic of a non-participating royalty interest), he normally lacks the power to execute leases ("executive right"), the power of exploration and development ("development right"), and the right to receive bonuses and delay rentals.[21] The owner of a mineral interest, however, ordinarily possesses these rights. Following the grant or reservation of a royalty interest, the mineral estate

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218 Miss. 109, 65 So. 2d 447 (1953); Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952); Abney v. Lewis, 213 Miss. 105, 56 So. 2d 48 (1952); Anderson v. Butler, 203 Miss. 512, 35 So. 2d 709 (1948); Palmer v. Crews, 203 Miss. 806, 35 So. 2d 430 (1948); Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So. 2d 516 (1947); Armstrong v. Bell, 199 Miss. 29, 24 So. 2d 10 (1945); McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945); Moss v. Jourdan, 129 Miss. 598, 92 So. 689 (1922).

[15] Palmer v. Crews, 203 Miss. 806, 35 So. 2d 430 (1948).

[16] McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945).

[17] Texas Gulf Prod. Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447 (1953); Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551 (1952); Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So. 2d 516 (1947).

[18] Texas Gulf Prod. Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447 (1953).

[19] Mounger v. Pittman, 235 Miss. 85, 86-87, 108 So. 2d 565, 566 (1959), *citing* Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955) and Palmer v. Crews, 203 Miss. 806, 35 So. 2d 430 (1948). This clause was later quoted verbatim and approved in Rogers v. Morgan, 250 Miss. 9, 164 So. 2d 480 (1964).

[20] Jones, *Problems*, *supra* note 1, at 291-92.

[21] Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955).

still has all the rights, powers, privileges and immunities attached to it that it had before except the right to receive all royalties on production from the land. "Remaining in the grantor, therefore, is the exclusive power to lease theretofore enjoyed by him. This power, called the executive right, is an incident of mineral fee ownership, and is not transferred by the royalty grant."[22]

The exclusive power to lease has been recognized in Mississippi as a separate and distinct property right, one of the alienable incidents of ownership of the full mineral interest.[23] In commenting upon the rights of a mineral owner, our court has said, in *Westbrook v. Ball*:

> The owner of minerals has the right to execute oil, gas and mineral leases, selecting the lessee and fixing the terms of the lease, and to receive therefrom the bonuses, delay rentals and royalties. *All these rights are transferrable and a grantor can transfer all of them, or only a part of them,* but in reserving the minerals, all are retained that are not specifically granted. (emphasis added).[24]

Thus in this case the court recognized as a present vested interest in realty the separate estates consisting of the right to lease, the right to receive royalty, the right to receive bonuses and the right to receive delay rentals. As separate estates, they may be assigned, alienated and devised, and should pass under the laws of descent and distribution.[25]

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[22] McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945); 2 WILLIAMS & MEYERS, *supra* note 1, § 338, at 193-94.

[23] Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955).

[24] *Id.* at 791, 77 So. 2d at 275.

[25] *See* Stone v. Texoma Prod. Co., 336 P.2d 1099 (Okla. 1959). The Oklahoma court held that upon conveyance of a mineral interest, the grantor may reserve to himself, "his heirs, executors, administrators and assigns," the exclusive power to lease, and a lease executed by his successors in interest is valid. Such power to lease is a vested property right which may pass by inheritance and assignment.

In Texas it has been held that unless the instrument creating the executive right in connection with a non-executive mineral interest expressly provides that it shall extend to the heirs and assigns of the executive, it will be construed as personal to the executive and terminates with the death of the original holder. The court held that the executive right is not a power coupled with an interest so that it would be preserved after the death of the donor or principal, but that it might be regarded as a power given by way of security which might not always terminate at the principal's death. The court stated that the power to lease "is not in itself an interest in land. It does not entitle the holder, either presently or at any time in the future, to possession or use of, or any benefit arising from, the land or any part thereof." Pan American Petroleum Corp. v. Cain, 355 S.W.2d 506 (Tex. 1962), citing and discussing the Oklahoma case above.

The excellent dissenting opinion by Justice Smith in Pan American Petroleum Corp. v. Cain is worthy of note since he argues that the reservation of the power to lease is a property right, an interest in land, appurtenant to the mineral interest therein conveyed, and for the use and benefit of the mineral interest retained and

The case of *Texas Gulf Prod. Co. v. Griffith*[26] also indicates that the power to lease is in itself a property right. The grantor first conveyed a one-half interest in the minerals by a full-participating mineral deed. A subsequent deed provided that the grantor conveyed "an undivided one-half interest in and to all of the oil, gas and other minerals, in, under and upon the following described lands," but "the grantors herein expressly reserve to themselves, their heirs or assigns, the exclusive right to lease said lands, or any part thereof, for oil and gas purposes, without interference or hindrance upon the part of the grantee, his heirs or assigns . . . ." together with the right to receive bonuses and delay rentals payable under such a lease. The grantor later exercised the right reserved to lease this one-half interest, and the Mississippi Supreme Court held that such lease was valid. Construing the instrument as a whole, the court held that an interest in the mineral estate was reserved, together with the executive right to lease, and that only a nonparticipating royalty was conveyed.

Further evidence that the executive right to lease a fractional mineral interest is regarded in this state as a property right capable of being inherited is found in the 1963 case of *Berry v. Luckett*.[27] The question was whether the beneficiary under a will had the right to lease a fractional mineral interest previously conveyed to her husband, or whether such right passed to another under a deed executed by her husband prior to his death. The Mississippi Supreme Court, in affirming the decision of the Chancellor, ruled that the right to lease passed to the grantee under the deed from Berry. The court quoted from the Chancellor's opinion as follows:

> Mrs. Doris Ross Berry, devisee under the will of D. F. Berry, Jr., acquired no title to the right to lease and collect the bonus and rentals on said 82/175ths interest in the minerals conveyed to H. G. Luckett by D. C. Luckett, *since Berry had divested himself of such title before his death.* She cannot, therefore, maintain a suit to cancel clouds on her title, since she shows no title in herself to said rights or interest. (emphasis added).[28]

The inference here is that had the grantor reserved the right to lease the fractional mineral interest, such right would have descended to his widow. Since there were no words of inheritance in the deed, presumably such words would not be necessary under our statute.[29] However,

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owned by the grantor, and as such passes on his death by descent to his heirs. This result would seem particularly apparent in Texas and Mississippi, where the concept of ownership of oil and gas in place is recognized.

[26] 218 Miss. 109, 65 So. 2d 447 (1953).

[27] 248 Miss. 99, 158 So. 2d 706 (1963).

[28] *Id.* at 106, 158 So. 2d at 709.

[29] MISS. CODE ANN. § 833 (1956).

since there seems to be no decision squarely in point, in drafting a reservation or grant of the executive right, it may still be prudent to include such words of inheritance as "heirs, executors, administrators or assigns" following the reservation to the grantor, if it is intended that the executive right is to have a duration beyond the lives of the holder of the right and the owner of the non-executive mineral interest.

The specific question of the effect of the Rule Against Perpetuities[30] on the executive right to lease[31] has not arisen in Mississippi. Since it has long been recognized that the holder of the pure royalty interest has no leasing power and need not be joined as a party to subsequent leases,[32] there appears to be no violation of the Rule as far as the executive right to lease a mineral estate which is subject to a non-participating royalty interest is concerned, particularly where the executive reserves some interest in the mineral estate.[33] The right to lease being inherent in the

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The Mississippi statute is similar to the Texas statute [TEX. REV. CIV. STAT. art. 1291 (1948)] discussed in Pan American Petroleum Corp. v. Cain, 355 S.W.2d 506 (Tex. 1962). Justice Smith in his dissenting opinion states that the Texas statute has been construed to apply in the same way in cases involving reservations from grants, and argues that "the purpose of the statute would be thwarted if we were to hold at this late date that technical words of inheritance were necessary to secure to the heirs of the grantor the rights expressly reserved to the grantor." He cites C.J.S. concerning the effect of this type of statute: "Under a statute providing that a conveyance of realty shall be construed to be a conveyance in fee without the use of the word 'heirs,' unless it appears from the language of the instrument that the grantor meant to convey an estate of less dignity, it is not necessary in order to constitute a reservation in fee that the reservation be limited to the heirs of the grantor." 26 C.J.S. *Deeds* § 138 (1956).

[30] R. GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) [hereinafter cited as GRAY]; 1 KUNTZ, *supra* note 1; 4A THOMPSON, REAL PROPERTY §§ 2018-21 (1961) [hereinafter cited as THOMPSON]; Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

[31] *See generally*, 1 KUNTZ, *supra* note 1, § 15.7; 2 WILLIAMS & MEYERS, *supra* note 1, §§ 322-26; Everett, *supra* note 1; Kuntz, *The Rule Against Perpetuities and Mineral Interests*, 8 OKLA. L. REV. 183 (1955) [hereinafter cited as Kuntz, *Perpetuities*]; Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests*, 32 TEXAS L. REV. 369 (1954) [hereinafter cited as Meyers, *Perpetuities*]; Morris, *Mineral Interests or Royalty Interests? Problems Created by Separation of Bonus, Delay Rental, Power to Lease and Right of Ingress and Egress*, 10 OIL & GAS INST. 259 (SW. Legal Fdn. 1959) [hereinafter cited as Morris, *Mineral Interests*].

[32] Mounger v. Pittman, 235 Miss. 85, 108 So. 2d 565 (1959).

[33] *See* Kuntz, *Perpetuities*, *supra* note 31.

> The exclusive leasing power arises in connection with granted or retained mineral and royalty interests. Regarding the royalty interest, for many years, it has been assumed that the holder of the pure royalty interest had no leasing power and need not be joined as a party to subsequent leases. Because of this characteristic, the interest has been referred to as the "non-participating royalty interest." Possibly, the problem of the validity of the exclusive leasing power in such instance can be solved by examining the character of the royalty interest rather than by examining the character of the power.

full mineral interest,[34] when such right is separated and a perpetual non-executive mineral interest created, it has been questioned[35] whether the Rule might be violated in view of the fact that the right to lease the entire mineral estate might be exercised beyond the period of the Rule.[36] The executive right has been compared to a power of appointment,[37] a power coupled with an interest,[38] a power given as security,[39] or a common law power of sale or exchange which has a statutory existence in some states as a power in trust.[40] It has been suggested that the difficulty with the Rule Against Perpetuities may be avoided by treating the exclusive right to lease as an incident of the mineral estate.[41] Thus

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Such royalty interest is somewhat like common law rent which could be granted or reserved with or without the reversion. The incorporeal hereditament of "rent" can be granted alone and measured by subsequent mineral production, with all of the rights of ownership remaining in the grantor, including the power to lease the land. This analysis would avoid the operation of the Rule for the reason that all interests are vested and that the separation of the leasing power from the royalty interest is an inherent characteristic of the interest. *Id.* at 189.

See also 1 KUNTZ, *supra* note 1, § 15.7, at 348.

[34] Mounger v. Pittman, 235 Miss. 85, 108 So. 2d 565 (1959); Gulf Ref. Co. v. Stanford, 202 Miss. 602, 30 So. 2d 516 (1947).

[35] 2 WILLIAMS & MEYERS, *supra* note 1, § 323, at 18.

True, there have been some comforting decisions with respect to such powers in connection with mere royalty interests, but most competent oil attorneys have been constantly plagued by the fear that our courts might hold that any attempt to place in the hands of one cotenant the perpetual and exclusive power to lease the entire mineral fee estate would violate the rule against perpetuities or the rule against restraints upon alienation or both. Under the circumstances, such attorneys have required ratification instruments from all non-leasing cotenants in situations where one cotenant has undertaken to lease the entire mineral fee estate. Jones, *Problems*, *supra* note 1, at 289.

[36] As stated by Gray, "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." GRAY, *supra* note 30, § 201.

[37] Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (1941). (The California court held that the reserved power to lease was a special power of appointment and that such power and a lease created by its exercise were invalid as a violation of the Rule Against Perpetuities.)

[38] Kilfoyle v. Wright, 300 F.2d 626 (5th Cir. 1962); Bonzo v. Nowlin, 285 S.W.2d 153 (Ky. 1955); Allison v. Smith, 278 S.W.2d 940 (Tex. Civ. App. 1955); Odstrcil v. McGlaun, 230 S.W.2d 353 (Tex. Civ. App. 1950); Superior Oil Co. v. Stanolind Oil & Gas Co., 230 S.W.2d 346 (Tex. Civ. App. 1950), *aff'd*, 150 Tex. 317, 240 S.W.2d 281 (1951).

[39] Pan American Petroleum Corp. v. Cain, 355 S.W.2d 506 (Tex. 1962).

[40] Stone v. Texoma Prod. Co., 336 P.2d 1099 (Okla. 1959); *See also* 2 WILLIAMS & MEYERS, *supra* note 1, § 324.2, at 42-45; Kuntz, *Perpetuities, supra* note 31.

[41] *See* Meyers, *Perpetuities, supra* note 31.

The executive right is viewed not as some variety of specially created power but as an incident of the mineral estate. The executive has the power to lease, just as he has the power to transfer in fee or for life, because he owns the mineral estate in which these powers inhere. To illustrate by resort to a popularization of Hohfeldian analysis, the mineral estate represents the totality of ownership in the minerals—the full bundle of sticks. Upon the grant or reservation of a non-executive oil and gas

the exclusive right to lease would be a vested interest not subject to the Rule.[42]

The Mississippi court, without discussing the application of the Rule, has recognized the validity of the reservation or grant of the executive right.[43] The court has also recognized the right to execute leases as one of the incidents of mineral ownership, a vested property right.[44]

Since the purpose of the Rule is to promote the free circulation of property in commerce and the leasing power held by one person is certainly conducive to such a policy, it seems that the Rule should not strike it down.[45] Over the period during which the Rule Against Perpetuities developed, there was no problem comparable to modern oil and gas practices to be dealt with by the courts and it would seem therefore that the Rule should not be applied to invalidate widespread commercial practices.[46] The application of the Rule in such cases is in a

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interest, one of the sticks is removed from the bundle; all the rest remain the property of the owner of the mineral estate. The non-executive owner has the right to receive certain income from the land and the mineral estate owner (and perhaps the oil and gas lessee) has the duty to pay this income to him. *Id.* at 408.

[42] "Vested interests are not subject to the rule." 4A THOMPSON, *supra* note 30, § 2020, at 637.

[43] Harris v. Griffith, 210 So. 2d 629 (Miss. 1968); Rogers v. Morgan, 250 Miss. 9, 164 So. 2d 480 (1964); Berry v. Luckett, 248 Miss. 99, 158 So. 2d 706 (1963); Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955); Texas Gulf Prod. Co. v. Griffith, 218 Miss. 109, 65 So. 2d 447 (1953); Armstrong v. Bell, 199 Miss. 29, 24 So. 2d 10 (1945).

[44] Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955).

[45] 2 WILLIAMS & MEYERS, *supra* note 1, § 325.

We have, therefore, to inquire whether separation of the executive right from a non-executive oil and gas interest in any way offends the policy of free alienability, for if it does not, neither should it contravene the Rule Against Perpetuities. . . . In short, when "alienability" is used in connection with property interests in oil and gas, it means the power to lease. Far from offending free alienability in this meaning of the word, the executive right increases the probability of leasing by eliminating the necessity for joinder in the lease by persons owning a share of the lessor's property interests, the non-executives. So long as landowners are permitted to divide up the prospective income under a future lease, the policy of the Rule Against Perpetuities is fostered, not infringed, by sustaining the executive right, which keeps the power to lease in the hands of a single person. The recalcitrant owner of a sixty-fourth non-executive mineral or royalty interest will not be in a position to withhold development of a large tract by demands far out of proportion to the value or significance of his fractional interest. *Id.* at 69, 71.

For a further discussion of policy behind the Rule, see Meyers, *Perpetuities*, *supra* note 31, at 415.

[46] *See* Everett, *supra* note 1.

Certainly an oil and gas lease is a commercial transaction, and the executive right under which one party is given the exclusive power to lease the mineral interest of another is equally a commercial transaction. Consequently it is clear that the policy of the rule is not violated. *Id.* at 515.

sense taking it out of context and applying it in a manner never contemplated.[47]

What the Mississippi court might decide in a case where the executive right is reserved or granted alone without any other incident of mineral ownership is not clear, and the case law on this point is extremely meager. The California court has ruled that the reservation of such a "naked" right is void under the Rule, construing it as a special power, unlimited in time, which enables the holder to create an estate in land at any time in the future.[48] One leading authority states that "if such power be treated as a separately alienable incident of mineral ownership, it is capable of being created as a naked power."[49]

In general it may be said that when the mineral interest is reserved, all rights not specifically conveyed are retained by the grantor. *McNeese v. Renner*[50] was a very simple case in which a grantor had reserved a mineral interest but had not specifically reserved the power to execute mineral leases. The court held that where one reserves a mineral interest it will be implied that he also has reserved the power to execute leases.

In the leading case of *Westbrook v. Ball*[51] the grantor conveyed certain lands, reserving 15/16ths of the minerals (1/16th of the minerals

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[47] Concerning the purpose of the rule, Everett quotes as follows from Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 737 (1952):

> Excessively long family settlements were the threat which produced the Rule; and the period of perpetuities was tailored to fit the needs of family gift transactions. To derive from a rule thus motivated a general concept applicable to commercial transactions is a step of doubtful wisdom. Lives in being have no significance in commercial transactions, nor has the period of twenty-one years. Everett, *supra* note 1, at 514-15.

[48] Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (1941). The California court upheld the contention of holders of non-participating royalty interests that the reservation in a deed of a perpetual executive right in the grantor was void as a violation of the Rule Against Perpetuities on the ground that such a right, with no other interest in the minerals reserved by the grantor, did not reserve any estate in the land, but only reserved a right or power to choose a lessee and enable the grantor to create an estate in land at any time in the future.

Such may not be the law in Oklahoma, where, from broad language of the court in Stone v. Texoma Prod. Co., 336 P.2d 1099 (1959):

> [O]ne may conclude that, contrary to the result reached in California [Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (1941)], the law in Oklahoma is that such power is still valid and that a lease given pursuant to its exercise is valid. From the broad language in the opinion, one may conclude that the power to lease is a property right whether or not it is associated with mineral ownership, and that such property right may be inherited and assigned without being attached to other incidents of the mineral interest. Annot., 10 Oil & Gas Rptr. 302 (1959).

[49] 1 KUNTZ, *supra* note 1, § 15.7, at 349.

[50] 197 Miss. 203, 21 So. 2d 7 (1945).

[51] 222 Miss. 788, 77 So. 2d 274 (1955).

had been reserved by a predecessor in title), together with the right of ingress and egress. The reservation read as follows:

> The grantor retains all of the oil, gas, and other minerals excepting sand and gravel, in, on, and underlying, and as may be mined and produced from said land, together with rights to go upon, enter, to explore for, drill for, mine, store, transport, and remove all of said minerals at any and all times from and after the date hereof. The grantor retains for himself a 15/16 of said minerals, and the remaining 1/16 was retained by F. A. Anderson, in deed to the grantor herein. It is agreed and understood that the grantee and his assigns are to receive the cash bonuses and delay rentals payable under any oil, gas, and mineral lease executed upon said land. All royalties payable will go to the grantor.[52]

The grantee sued for construction of the reservation in the deed, contending that it was the intent of the parties that he should have the exclusive right to execute oil, gas and mineral leases. The court held that since the grantor had retained a "mineral" interest, rather than a "royalty" interest, he had retained all of the rights characteristic of such an interest, i.e., "the right to execute oil, gas and mineral leases, selecting the lessee and fixing the terms of the lease, and to receive therefrom the bonuses, delay rentals and royalties."[53] The court stated further that all of these rights, or only a part of them, may be transferred but that in reserving the minerals, all are retained that are not specifically granted. The grantee was therefore entitled only to bonuses and rentals from any lease executed by the grantor.

In *Mounger v. Pittman*,[54] the court construed this reservation:

> We do hereby reserve for ourselves, our heirs and assigns, one-eighth of all the oil and gas which may be produced from said lands to be delivered in tanks and pipelines in the customary manner, and this shall be a covenant running with the land and all sales and other conveyances of said lands shall be subject to this reservation and agreement.[55]

In a five-to-three decision, the Mississippi Supreme Court held that the interest reserved was a mineral interest because the deed, according to the court, did "not provide, either expressly or by implication, that grantors' share of the production is to be free of cost of discovery and production."[56] Nor did the deed "specifically grant to the grantee any right to discover and produce the one-eighth of the oil and gas, or to

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[52] *Id.* at 789-90, 77 So. 2d at 275.
[53] *Id.* at 791, 77 So. 2d at 275.
[54] 235 Miss. 85, 108 So. 2d 565 (1959).
[55] *Id.* at 86, 108 So. 2d at 566.
[56] *Id.* at 87, 108 So. 2d at 566.

grant leases, or to receive bonuses and delay rentals; therefore all these rights were retained by the grantors."[57]

It has also been held that the executive right to lease follows the ownership of the mineral interest when conveyed unless specifically severed.[58] In *Berry v. Luckett* the grantor had acquired the entire mineral interest, less a fractional part interest. The grantor also had the right to lease and retain bonus payments appurtenant to such fractional interest. The grantor then conveyed all he owned less a reserved fractional mineral interest in himself, but did not reserve any right to lease and retain bonus payments except those rights as appurtenant to his reserved fractional interest. The court held that the grantor did not retain ownership of a right to lease and retain bonus payments which he previously owned concerning the fractional interest in a third party. The court stated:

> This was a general warranty deed and conveyed to Cook all the right, title and interest in said lands and minerals owned by the said Berry not excepted therefrom or reserved therein to the grantor. Berry thereby divested himself of all interest in said lands and minerals except 40/175th interest in said minerals specifically reserved to the grantor.[59]

Some question has arisen as to whether a reservation of either the executive right or the development right amounts necessarily also to a reservation of the other. Such a question might arise only in connection with a non-executive mineral interest since a royalty interest does not have the development right. If a deed grants 1/2 of the minerals, reserving the exclusive right to lease in the grantor, but granting 1/2 of bonus, rentals and royalty, a controversy could arise between grantor and grantee when the grantee tried to enter before a lease had been executed and between grantee and lessee after the land was leased. There is very little case law on this subject but the consensus among leading authorities holds the better position to be that reservation of the executive right amounts to reservation of the development right, so that the right to lease and the right to develop are correlative.[60]

The reason for such a view has been stated as follows:

The practical results of separating the development right from

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[57] *Id.*

[58] Berry v. Luckett, 248 Miss. 99, 158 So. 2d 706 (1963). *See also* 1 KUNTZ, *supra* note 1, § 15.7, at 350.

[59] Berry v. Luckett, 248 Miss. 106, 158 So. 2d 709 (1963).

[60] 1 WILLIAMS & MEYERS, *supra* note 1, § 304.10 at 501-03 (1964), *citing*, Hudgins v. Lincoln Nat'l Life Ins. Co., 144 F. Supp. 192 (E.D. Tex. 1956); Skelly Oil Co. v. Cities Service Oil Co., 160 Kan. 226, 160 P.2d 246 (1945). "[I]f the right to lease is granted, this carries with it the exclusive right to develop." Morris, *Mineral Interests, supra* note 31, at 277, *quoting* annot., 1 Oil & Gas Rptr. 960 (1953).

> the executive right would be disastrous: if the non-executive could develop at any time, despite the execution of a lease covering the land, no lease is likely to be executed because operators could not afford the risk. The executive right would accordingly be rendered nugatory. On the other hand, if the development right was considered to exist only if no lease existed on the land, there would be the further problem of determining whether the exercise of such right gave the owner exclusive operating rights. If so, the executive right is rendered nugatory. If not, the development right is not worth much, since the owner would be risking his capital to explore for the benefit of a subsequent lessee who enters under the lease to drill development wells in a proven field.[61]

It has been held, in *Harris v. Griffith*,[62] that the reservation of bonuses and rentals justifies the implication of an intent to retain the executive right in the grantor. It was stated in that case that "they are closely and materially related to the executive right. The latter may be separated, but this should be done explicitly."[63] Since this is such an important ruling, it is appropriate to consider the case in some detail. The case involved the construction of a deed from Carl F. Griffith and wife to Thomas O. Payne which "granted, sold and conveyed . . . an undivided 1/4 interest in and to all of the oil, gas and other minerals of every kind and character *in, on or under*" the described land. This is recognized as appropriate language to create a 1/4 mineral interest.[64] The deed was a printed form entitled "Mineral Right and Royalty Transfer," which has been said to indicate that the interest is a mineral interest.[65] The word "Right" had been struck out and the word "Deed" substituted. The printed clause providing for the right of ingress and egress for the purpose of development had been left intact. After the description of the property, the deed read: "It is the intention of the Grantors herein to convey 64-3/4 full mineral acres. This instrument is to be non-participating both as to bonuses and lease rentals."[66] The grantee had proceeded to lease his 1/4 interest, but the court held that it was a conveyance of a non-participating royalty, without the leasing right, rather than a mineral interest with the right to develop or lease the 1/4 interest. The court stressed the fact that bonuses and lease rentals had been retained by the grantor.

With all due deference and respect for the court, it is suggested that the deed conveyed a full 1/4th mineral interest including the right to

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[61] 1 WILLIAMS & MEYERS, *supra* note 1, § 304.10, at 503.

[62] 210 So. 2d 629 (Miss. 1968).

[63] *Id.* at 634.

[64] Ford v. Jones, 226 Miss. 716, 85 So. 2d 215 (1956).

[65] *Id.*

[66] Harris v. Griffith, 210 So. 2d 629 (Miss. 1968).

develop or lease such interest, with only bonuses and lease rentals retained by the grantor. Since it has been held that in a reservation of minerals, all rights are retained that are not specifically conveyed, when minerals are granted, all rights presumably are granted that are not specifically retained. In view of the fact that it has also been held in Mississippi[67] that the various rights which make up the mineral estate are separate and distinct property rights and may be transferred in whole *or in part,* a grouping of bonuses and lease rentals reserved by the grantor should not constitute "an implied retention of the executive right," as concluded by the court in this case. There was no specific retention of the executive right by the grantor.

Two similar cases cited by the court in its opinion are of particular interest since they reached contrary conclusions. The chief difference between these cases and the *Harris* case is that bonus and delay rentals went to the *grantee* under the respective deeds instead of being reserved by the *grantor.* In *Hudgins v. Lincoln Nat'l Life Ins. Co.,*[68] the deed contained a reservation in the following language:

> There is reserved unto the Grantor an undivided one-half (1/2) interest in the oil, gas and other minerals in, under and on said property *but shall not be entitled to receive any part of any bonuses paid by lessee or any part of the rentals that may be paid for the privilege of deferring the commencement of a well or drilling operations.*[69]

The court held that the grantor had retained a royalty interest only and therefore could not execute an oil and gas lease as to his 1/2 interest. The court stated that the grantee had "the power and authority to subject the entire mineral interest in the tracts of land covered by said deed to oil and gas leases and that the mineral estate reserved by Lincoln [grantor] in said deed was to become a royalty interest under any oil or gas lease thereafter executed by the grantee in said deed or his assigns . . . ."[70] It was also held that Lincoln was entitled to one-half (1/2) of the royalty provided for in any such lease.

In *Martin v. Snuggs*[71] the deed contained the following:

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[67] Westbrook v. Ball, 222 Miss. 788, 77 So. 2d 274 (1955).

[68] 144 F. Supp. 192 (E.D. Tex. 1956).

[69] *Id.* at 193.

This reservation did not expressly strip the interest of two other ingredients, i.e., the power to lease and the right to develop. The court, in effect, held that the right to bonuses and delay rentals carried with it the power to lease. The court also held, in effect, that by implication the exclusive right to develop passed by the deed and hence was not reserved. Annot., 6 Oil & Gas Rptr. 1072-73 (1956).

[70] Hudgins v. Lincoln Nat'l Life Ins. Co., 144 F. Supp. 192, 198 (E.D. Tex. 1956).

[71] 302 S.W.2d 676 (Tex. Civ. App. 1957).

> Save and except, however, unto the Grantor, his heirs and assigns, an undivided one-half interest in and to all oil and mineral rights in and under the land described herein. It is agreed, however, that the Grantor shall not participate in the cash bonus or cash rentals paid for drilling or delay payments.[72]

The grantee Martin brought suit against the grantor's successor to establish that the interest excepted was a non-participating mineral interest without any leasing or development rights. The court, although it granted reformation of the deed as an alternative relief, refused to follow the *Hudgins* case, stating:

> We have concluded, however, that *the deed on its face does not grant Martin exclusive leasing rights.* The reservation is an outright reservation of an undivided one-half interest in and to all oil and mineral rights in and under the land described. The only limitation placed on said reservation is that the grantor shall not participate in the cash bonus or cash rentals paid for drilling or delay rights . . . . We agree with appellees that the reservation in the Frost deed, on its face, did not give the grantee exclusive leasing rights, but reserved to Frost an undivided one-half of the mineral estate *with all the rights inherent in a mineral estate,* except only the right to cash bonuses and delay rentals. (emphasis added).[73]

The holding in the *Martin* case appears to be preferable, and is the view endorsed by some eminent writers.[74] One comments as follows:

> Where appropriate language has been used to reserve a *mineral interest,* that mineral interest should be considered to have all of the inherent qualities of the mineral fee save and except those which are expressly given to the grantee. The power to lease is one of those qualities. It may be a very important one, depending upon the circumstances, and unless the deed has other language tending to indicate that it was the intention of the parties to give the leasing power to the owner of the bonuses and delay rentals, it should not be severed from the mineral fee.[75]

Professors Williams and Meyers[76] also argue that the reservation of bonuses and rentals in a grant should not be construed as a reservation of the executive right:

> This argument proceeded on the theory that a mineral estate has as its incidents bonus, rental, and royalty under a lease and the right to execute a lease. One or more of these incidents can be separated from the mineral estate without affecting the

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[72] *Id.* at 676.

[73] *Id.* at 677-78.

[74] Morris, *Mineral Interests, supra* note 31.

[75] *Id.* at 287.

[76] 1 WILLIAMS & MEYERS, *supra* note 1, § 304.10.

> others. Parties creating a mineral estate should be presumed to intend it to have all incidents except those specifically excluded.[77]

The Texas court quoted from *Westbrook v. Ball*[78] wherein the Mississippi court listed the rights inherent in the mineral estate which could be separately transferred but stated that in reserving the minerals all are retained that are not specifically granted. In *Martin*, the power to lease, one of the inherent qualities of mineral ownership, was not expressly severed; consequently, the severance of bonuses and delay rentals did not by implication carry with it the executive right.

Harris has left the law in a state of uncertainty and confusion. Speaking of rentals and bonuses and the "related" executive right, the court said: "The latter may be separated but this should be done explicitly."[79] This enunciates a new doctrine in Mississippi. It puts in doubt the meaning of thousands of instruments yet to be interpreted, instruments which were written by lawyers who relied upon the notion expressed in *Westbrook v. Ball*, that in reserving the minerals, all are retained that are not specifically granted, and its necessary corollary that, in granting minerals, all are conveyed that are not specifically reserved. The court seems to be saying that there are certain groups of rights which belong together; that all these rights, in a given group, will be transferred or reserved, if any one of them is transferred or reserved, unless there is specific language in the instrument to separate them. To confuse the matter further, the parties had carefully retained in the instrument a clear grant of the right to develop and the right of possession for that purpose, all passing to the grantee. Certain portions of the printed form were stricken, and this would seem, clearly, to indicate a positive intention to retain, as effective language, all those provisions which were thus selected for retention and use. This broad grant of the right to develop was rendered wholly inoperative by the decision.

One other comment on this case is in order. The court said in the closing lines of the opinion that no adjudication was made as to the amount of royalty due appellants, and the court recognized the possibility of another suit on this point. This illustrates the problem which grows out of the position taken by the court in this and other cases that a non-participating mineral interest is in substance a royalty interest. This is true only in a most general sense. When the question as to the

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[77] *Id.* at 502.

[78] 222 Miss. 788, 77 So. 2d 274 (1955).

[79] Harris v. Griffith, 210 So. 2d 629 (Miss. 1968).

quantum of the interest conveyed is addressed, the importance of maintaining a distinction between these two estates becomes immediately apparent. Assuming a lease with the usual one-eighth royalty provision, an outstanding one-sixteenth royalty interest will take half of the royalty under the lease, but a one-sixteenth non-participating mineral owner would be entitled to only one/one-hundred twenty-eighth of the production, or one-sixteenth of the royalty under the lease. It may be true that a non-participating mineral interest is a royalty interest, but how great an interest is it? No clear rule has yet emerged on this point. If the distinction is maintained, the question does not arise.

II.

Executive Right to Pool As Well as Lease

Closely allied with the right to lease is the question whether the executive has the right to pool the interests of the non-participating royalty and mineral owners without their express consent. The usual instrument creating a non-executive interest is silent concerning the power of the executive to bind these interests. This question has become increasingly important in recent years with the rapid development of the oil and gas industry. Operations have become more expensive, and the right to pool various interests into one operation has become a valuable one from an economic standpoint, as well as from a conservation standpoint in promoting a more efficient and scientific use of our mineral resources, by the drilling of fewer wells and the preservation of reservoir energy in order to obtain the maximum amount of oil or gas. Such a pooling is usually effected by a unitization agreement, by a community lease,[80] or by a pooling clause in the lease itself. In our discus-

[80] A "community lease" has been defined as "a single lease covering two or more tracts executed by the separate owners as if they were joint owners." Hardwicke & Hardwicke, *Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease*, 32 Tex L. Rev. 660 (1954) [hereinafter cited as Hardwicke]. The several tracts are thereby unitized or pooled and operated by the lessee as a unit. The normal result is to apportion royalties among the several lessors according to the amount of land or mineral interest each lessor contributes to the unit. 2 Williams & Meyers, *supra* note 1, § 521.2; 6 Williams & Meyers, *supra* note 1, § 904. *See* Howell v. Union Prod. Co., 392 F.2d 95 (5th Cir. 1968); Parker v. Parker, 144 S.W.2d 303 (Tex. Civ. App. 1940). These Texas cases hold that the joinder of two or more interests in separate tracts in a lease, which refers to the owners as "lessor," creates a pooled or communitized lease as a matter of law, requiring apportionment of royalties unless the lease states otherwise. *But see* Louisiana Canal Co. v. Heyd, 189 La. 903, 181 So. 439 (1938), holding that there does not necessarily arise a presumption that the parties intended to pool merely from the execution of a joint lease.

sion of this problem, the terms "pooling" and "unitization," although differing in certain technical aspects,[81] are used interchangeably to mean the joint operation of an area for the exploration and drilling for oil and/or gas by several owners or lessees, with the royalty apportioned according to the acreage contributed by each.

Before considering the cases dealing directly with the right of the executive to pool the non-executive interests, it is appropriate to examine several relevant theories.

In the absence of some evidence of intent to pool or unitize, the majority rule[82] is that where the owner of a tract of land leases the same as a whole for oil and gas and thereafter subdivides the land into several tracts and conveys the same without reserving the royalty interest therein, the purchaser of each of such several tracts will only acquire the right to receive the royalty in any oil or gas produced from a well on his individual property. This is known as the "non-apportionment rule."[83] Such theory has been criticized as unfair to the owners of the tracts on which no well is drilled,[84] since they are deprived of any royalty under the lease and are also deprived of any further delay rental payments once there is a producing well on the leased tract. The lease is considered as a unit for purposes of development but not for the purpose of apportioning royalties. In a jurisdiction following this rule, the purchaser of a non-participating royalty interest in one of the subdivided sections subject to the lease will not receive any royalties unless a well is drilled on the particular tract in which he has an interest. This result can be avoided if the executive has the right to pool the non-executive interest, or if the non-executive joins voluntarily in a pooling agreement.

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[81] "Although the terms 'pooling' and 'unitization' are frequently used interchangeably, more properly 'pooling' means the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules whereas 'unitization,' or, as it is sometimes described, 'unit operation,' means the joint operation of all or some part of a producing reservoir." 6 WILLIAMS & MEYERS, *supra* note 1, § 901, at 2, § 929, at 551.

[82] 2 WILLIAMS & MEYERS, *supra* note 1, § 520, at 666.

[83] Texas adopted the non-apportionment theory in Japhet v. McRae, 276 S.W. 669 (Tex. 1925), and has consistently followed it except when a community lease, an entirety clause in the lease, a "subject-to" clause in mineral or royalty deeds, or a pooling or unitization agreement has been involved, or the conveyance is of a tract not entitled to a well permit under the applicable spacing rule. 2 WILLIAMS & MEYERS, *supra* note 1, § 520, at 667 n.3.

[84] *See* annot., 64 A.L.R. 634. *See also* Huie, *Apportionment of Oil and Gas Royalties*, 78 HARV. L. REV. 1113, 1134 (1965) [hereinafter cited as Huie], an excellent analysis of the non-apportionment and apportionment theories. Professor Huie argues that the apportionment rule is more just than the non-apportionment rule and is more likely to coincide with the probable intent of the parties.

Under the "apportionment" theory, production under the lease is allocated proportionately to all the parties having an interest in the property. Apportionment also results when interests are unitized, whether by voluntary agreement of all interested parties, by "equitable pooling" as has been recognized in Mississippi,[85] or by compulsory pooling or unitization statutes. In such cases, a percentage of the total production in the unit is allocated to each property contributed to the joint operation, and the royalty owner then shares proportionately in such allocation.

In *Merrill Engineering Co. v. Capital Nat'l Bank*,[86] the court indicated that the non-apportionment rule was "well settled" in Mississippi. But in *Griffith v. Gulf Refining Co.*[87] (an "equitable pooling" case), the court indicated that the apportionment rule was sound and should be followed where all of the land covered by the original lease is included within a drilling unit formed under conservation laws. Otherwise, the owner of the undeveloped portion of the lease would be deprived of any production from his land, since his right to demand drilling has been taken away by the establishment of the drilling unit. The court distinguished *Merrill Engineering*, which was decided in 1942, but the rights there under consideration had their inception prior to the enactment of Chap. 117, Laws of 1932, and prior to the adoption and promulgation by the State Oil and Gas Board of spacing and other conservation regulations, which the legislature, in the exercise of the state's police power, authorized by said chapter. The court stated:

> Consequently, the common law rule [of non-apportionment] is now limited and circumscribed by the conservation rules and regulations of the Board, which were in effect at the time of the accrual of the rights of the parties here.[88]

Under the compulsory pooling law adopted in 1948, as amended in 1950,[89] the Mississippi Oil and Gas Board has the authority to define a drainage area and to unitize the tracts within such area, resulting in an apportionment of royalties among the various owners in the drilling unit. Whether, aside from "equitable pooling" principles or pooling by statute, this state may follow the apportionment rule as a general matter is not clear at this time. It has been suggested that the conclusion in the *Griffith* case that the royalty should be apportioned "could have been

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[85] Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So. 2d 518 (1952).

[86] 192 Miss. 378, 5 So. 2d 666 (1942).

[87] 215 Miss. 15, 60 So. 2d 518 (1952).

[88] *Id.* at 25, 60 So. 2d at 520.

[89] Miss. Code Ann. § 6132-22 (1952).

based on either the equitable pooling principle, to which Mississippi is committed, or on the apportionment view of *Wettengel v. Gormley*.[90] In fact, the various opinions of the court invoked both doctrines to sustain its conclusion without clearly differentiating between the two."[91] Such a contention is based chiefly on the opinion of the court by Judge Hall overruling the suggestion of error, in which he quotes at length and with apparent approval from the first opinion in *Wettengel v. Gormley*. Judge Hall refers to that case as the first in which "this question" was ever raised, and states: "It specifically upholds our view that Griffith is entitled to royalties under the 90-acre tract . . ."[92] which, according to Professor Huie, might be construed as an unqualified acceptance of the apportionment view.[93] It appears that there is some, but scant, support for this view. The most that can be said with assurance is that there is room for further development in our law on this issue. The great equity of the apportionment concept makes it probable that the court will have further opportunity to consider this question.

The cases are divided as to the effect of unitizing upon titles of the parties, that is, whether oil and gas pooling is only a matter of contract or whether it results in a cross-transfer of interest in land. The position taken by the advocates of the so-called "contract theory" is that the act of unitizing has no effect on the titles of the parties to the unitized area, and that there is no conveyance of an interest in real property between those owners who join in the pool or unit. Consequently, the right of the various parties to share in the production from the tracts of the other parties is merely a contract right, derived from the agreement of the parties, to share in the production and computation of royalties.[94]

The cross-conveyance doctrine is that, by the act of unitizing, each party to the unitized area conveys a real interest in his tract to every other party in return for which there is a similar conveyance of interests in their tracts to him.[95]

[90] 160 Pa. 559, 28 A. 934 (1894), *sugg. of error overruled*, 184 Pa. 354, 39 A. 57 (1898).

[91] Huie, *supra* note 84, at 1143.

[92] 215 Miss. 15, 39, 61 So. 2d 306, 308 (1952).

[93] Huie, *supra* note 84, at 1117.

[94] Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954) (leading case supporting the contract theory); Kenoyer v. Magnolia Petroleum Co., 173 Kan. 183, 245 P.2d 176 (1952); Arkansas Louisiana Gas Co. v. Southwest Natural Production Co., 221 La. 608, 60 So. 2d 9 (1952); Boggess v. Milam, 127 W. Va. 654, 34 S.E.2d 267 (1945). "In our opinion, the so-called unitization agreement does not effect a merger of title. . . . It consolidates only the contractual interests under the leases to the United Fuel Gas Company." Boggess v. Milam, 127 W. Va. 654, 34 S.E.2d 267, 270 (1945).

[95] Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 129 P.2d 383 (1942); Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472 (1942); Masterson, *The Nature of Unitized Title*, 10 Sw. L.J. 146 (1956) [hereinafter cited as Masterson].

The cross-conveyance theory has become an established rule of property in Texas.[96] Such a theory was first expressed in the case of *Veal v. Thomason*,[97] in which several owners of separate tracts of land granted a joint or community lease to The Texas Company. The lease provided that each such landowner was vested with an interest in the royalty oil produced anywhere on the unitized block on an acreage basis. The court held that the effect of the unitized lease contract was "to constitute all the lessors of land in the unitized block joint owners, or joint tenants, of all royalties reserved in each of the several leases in such block, the ownership being in the proportion which the acreage of each lease contract bears to the total acreage of the unitized block."[98]

Several subsequent Texas cases have reaffirmed the doctrine. In *Brown v. Smith*,[99] the court stated:

> An oil and gas lease jointly executed by the owners of two or more tracts of land owned in severalty, with provision for pooling or sharing, on the basis of acreage, the royalties from oil or gas produced anywhere on the leased land, has the effect of vesting all of the lessors, at least during the life of the lease, "with joint ownership of the royalty earned from all the land in such block." Veal v. Thomason, 138 Tex. 341, 349, 159 S.W.2d 472, 476. The lease so executed is a conveyance by each lessor to each of the other lessors of an undivided interest in the royalties. Lusk v. Green, 114 Okla. 113, 245 P. 636. The joint ownership of the royalty interest in all of the land included in such a lease is created by the action of the several landowners in joining in the execution of the lease. French v. George, 159 S.W.2d 566, 569 . . . .[100]

In *Renwar Oil Corp. v. Lancaster*,[101] the court stated that certain unitization agreements conveyed an interest in realty, citing *Veal v. Thomason*:

> In addition plaintiffs seek an adjudication that certain unitization agreements are void and ineffective as to them. Since these agreements are essentially a conveyance of an interest in realty, Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472, this constitutes an effort to remove cloud from title, even though alleged as an effort to construe a contract.[102]

The theory of cross-assignment was also extended in Texas by dictum to include a unit created under a lease pooling clause.[103]

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[96] MYERS, *supra* note 1, § 13.02, at 438.

[97] 138 Tex. 341, 159 S.W.2d 472 (1942).

[98] *Id.* at 349, 159 S.W.2d at 476.

[99] 141 Tex. 425, 174 S.W.2d 43 (1943).

[100] *Id.* at 430, 174 S.W.2d at 46.

[101] 154 Tex. 311, 276 S.W.2d 774 (1955).

[102] *Id.* at 315-16, 276 S.W.2d at 776.

[103] Miles v. Amerada Petroleum Corp., 241 S.W.2d 822 (Tex. Civ. App. 1950).

There is a conflict in the decisions as to whether the interest of the lessor in the unitized area is appurtenant to the tract contributed by him, and passes automatically upon a transfer of the lessor's interest in his own tract, or whether it is held in gross so that it must be specifically provided in the deed that the lessor's interest in the other unitized tracts passes. The generally accepted view in Texas is that a unitized interest passes with a conveyance of the lessor's tract.[104]

California, although regarded as a non-ownership-in-place state, also seems committed to the view that unitizing results in a cross-conveyance of a real property interest on the part of each party to the unitized area, *i.e.*, an incorporeal hereditament in gross. In *Tanner v. Title Insurance & Trust Co.*,[105] the California Supreme Court stated:

> The royalty interest thus transferred by each landowner to his colessors is an incorporeal hereditament in gross . . . and the grantee's interest in the oil produced upon the property of one of the colessors is entirely separate and distinct from the royalty interest retained by him in oil which might be produced from his own premises.[106]

However, it has been held in California that the royalty accruing to each lessor from tracts contributed to a community lease is a personal right and that a surrender of a portion of the leased premises does not change the rights of the community lessors under the original lease to an apportioned share of royalties from production anywhere on the unitized premises.[107] Each lessor acquires a separate incorporeal interest in the lands of his co-lessors, which survives surrender or transfer of his tract and which does not pass with a subsequent conveyance unless expressly granted in the instrument.[108]

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[104] Walker, *Developments in the Law of Oil and Gas in Texas During the War Years*, 25 TEX. L. REV. 1, 14 (1946).

[105] 20 Cal. 2d 814, 129 P.2d 383 (1942). *See* Hardie v. Chew Fish Yuen, 65 Cal. Rptr. 594 (Cal. App. 1968) (concerning indispensable parties and consistent with the cross-conveyance theory); Tanner v. Olds, 29 Cal. 2d 110, 173 P.2d 6 (1946) (reiterating the same rule of property and citing the Veal case). *See also* Ragsdale v. Superior Oil Co., 85 Ill. App. 2d 467, 229 N.E.2d 299 (1967), *rev'd*, 237 N.E.2d 492 (1968), holding that all parties to a unitization agreement must be joined as indispensable parties in a suit concerning one of the tracts in the unit, and indicating that Illinois also has adopted the cross-conveyance theory.

[106] Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 129 P.2d 383, 386 (1942).

[107] Tanner v. Olds, 29 Cal. 2d 110, 173 P.2d 6 (1946); Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 129 P.2d 383 (1942); Clark v. Elsinore Oil Co., 138 Cal. App. 6, 31 P.2d 476 (1934).

[108] Tanner v. Olds, 29 Cal. 2d 110, 173 P.2d 6 (1946); Tanner v. Title Ins. & Trust Co., 20 Cal. 2d 814, 129 P.2d 383 (1942); 2 WILLIAMS & MEYERS, *supra* note 1, § 521.2, at 673. *But see* LeBard v. Richfield Oil Corp., 56 Cal. 2d 532, 364 P.2d 449, 15 Cal. Rptr. 617 (1961), wherein the court stated: "Whether in any given agreement for unit development, the *Tanner* rules will be applicable between the

It has been suggested that, in a jurisdiction which recognizes the cross-conveyance theory, parties to a unitization agreement may not prevent the application of the doctrine by expressly providing in the agreement that it is not the intent of the parties to cross-convey their interests.[109] However, Mr. Hoffman takes the contrary view that such a provision is valid, and states:

> There can hardly be any objection in the law to such an express agreement that the pooling or unitization shall not constitute an exchange or transfer of real property interests.[110]

Other writers have expressed the view that in the majority of pooling and unitization agreements the parties thereto do not intend to effect cross-conveyances of the historic title to their mineral interests.[111]

In the Mississippi case of *Merrill Engineering Co. v. Capital Nat'l Bank*,[112] the court recognized the corporeal nature of the lease and held that a fractional royalty interest in a producing natural gas well arising as a result of a community lease or pooling agreement is appurtenant to the particular property upon which the fractional royalty is based, and hence passes with a conveyance of such premises unless expressly reserved or excepted.

In this case several owners executed separate leases to the same lessee and *thereafter* entered into a pooling or community agreement for sharing the royalties on the basis of the area of land owned by each from a well that might be produced anywhere on the pooled area. The Mississippi Supreme Court held that this situation was no different from "a case where the respective owners of several tracts of land join in a

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parties will depend on the terms of the agreement." *Id.* at 537, 364 P.2d at 452, 15 Cal. Rptr. at 620. Such comment indicates the possibility of avoiding a cross-conveyance by including in the agreement some express provision to the effect that it shall not be construed to effect a cross-conveyance. 6 WILLIAMS & MEYERS, *supra* note 1, § 930.1, at 562.1.

[109] Masterson, *supra* note 95, at 150.

[110] HOFFMAN, VOLUNTARY POOLING AND UNITIZATION 168 (1954) [hereinafter cited as HOFFMAN]. *See* LeBard v. Richfield Oil Corp., 56 Cal. 2d 532, 364 P.2d 449, 15 Cal. Rptr. 617 (1961), suggesting the possibility that parties to a pooling or unitization agreement may by express agreement avoid a cross-conveyance.

[111] Hammonds and Ray, *Unitization of Oil and Gas Properties*, 31 TAXES 199, 200-01 (1953).

[112] 192 Miss. 378, 5 So. 2d 666 (1942). *See* Gillis, *Involuntary Equitable Pooling in Mississippi*, 27 MISS. L.J. 10, (1955).

> While the extent to which the cross-conveyance theory applies in Mississippi is not now determinable, it is clear from the *Merrill* case that Mississippi has not been influenced by the implications of the doctrine to the same extent as other jurisdictions. In Mississippi it appears that a grantee of all or a portion of an area previously committed to a pooled area will receive all the benefit his grantor had in that unit, unless the instrument contains language expressing a contrary intention. *Id.* at 18.

single lease for the purpose of having the whole area developed as a unit for oil and gas, with the right to share in the royalties according to the area of land owned by each . . . ."[113] Thus the court treated the several instruments as a "community lease" and stated that, since in this state oil and gas in place are minerals and part of the realty:

> . . . Merrill Engineering Company, having acquired the royalty interest pertaining to Block "W" under his warranty deed to the fee from F. A. Johnson, et. al., conveyed such royalty interest and merged the same with the greater interest in the fee simple title, when the fee simple title was mortgaged to the Capital National Bank, and the lien of the deed of trust became a lien upon the entire interest, including the royalty, and a foreclosure of those liens on the land passed the royalty interest, along with the surface rights, without regard to whether or not the same were mentioned in the trustee's deed as hereinbefore stated, since they were not reserved from the fee sold.[114]

The court apparently based its decision on the theory that there was a covenant running with the land.

The cross-conveyance theory has been severely criticized by a distinguished writer, Mr. Leo Hoffman, who concludes:

> Considering all the relevant factors, however, the [Texas] court might have been better inspired to recognize the pooling or unitization device as something relatively new in the law which cannot be arbitrarily forced into the traditional concepts of property law.[115]

The theory has been rejected by courts in other jurisdictions, *e.g.*, Kansas, Louisiana and West Virginia, as well as by the Court of Appeals for the Tenth Circuit in a case arising in Utah.[116] Oklahoma has also

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[113] Merrill Engineering Co. v. Capital Nat'l Bank, 192 Miss. 378, 397, 5 So. 2d 666, 671 (1942).

[114] *Id.* at 395, 5 So. 2d at 670.

[115] HOFFMAN, *supra* note 110, at 161.

[116] *See* Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955); Kenoyer v. Magnolia Petroleum Co., 173 Kan. 183, 245 P.2d 176 (1952); Hover v. Cleveland Oil Co., 150 Kan. 531, 95 P.2d 264 (1939); Arkansas Louisiana Gas Co. v. Southwest Natural Production Co., 221 La. 608, 60 So. 2d 9 (1952); Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936); Boggess v. Milam, 127 W. Va. 654, 34 S.E.2d 267 (1945); Lynch v. Davis, 79 W. Va. 437, 92 S.E. 427 (1917); HOFFMAN, *supra* note 110, at 154-69.

"Thus it appears that the effect of unitization was to be only with respect to allocation of production, and the computation of royalties was not to effect cross-transfers of royalty interests. The Unitization Agreement clearly so provided." Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954).

Some evidence of rejection of the cross-conveyance theory is found in the following cases in Montana: Stumpf v. Fidelity Gas Co., 294 F.2d 886 (9th Cir. 1961); Toomey v. State Board of Land Commissioners, 106 Mont. 547, 81 P.2d 407 (1938); Nadeau v. Texas Co., 104 Mont. 558, 69 P.2d 586 (1937).

apparently rejected the view that unitizing results in a cross-conveyance of a real interest on the part of each party to the unitized area. In the leading case of *Sinclair Crude Oil Co. v. Oklahoma Tax Comm.*,[117] the cross-conveyance theory was expressly rejected by the supreme court, where words of grant were not contained in the communitization agreement. And in the later case of *Garvin v. Pettigrew*,[118] pooling did not effect a cross-assignment of royalty interests. In this case, where several owners of contiguous tracts of land had entered into an oil and gas pooling agreement whereby each party was to share in a stated fractional amount of the royalty received from any and all production from the entire area, on the basis of acreage contributed, but each owner reserved the right to lease his individual property and to retain all of the bonuses and rentals therefrom, it was held that the heirs of two of said owners, who had conveyed their premises prior to death, had no right or property interest in the land of the other contracting parties and their grantees. The Discussion Notes at the end of this case in the Oil and Gas Reporter state:

> The principal case settles, or at least seems to settle, two questions of Oklahoma law. First, Oklahoma does not follow the theory, adopted in Texas and California, that the execution of a pooling agreement works a conveyance between the parties of interests in the royalties in their respective tracts. Second, the various owners of lands covered by such an agreement do not retain any interest in production from the others' lands after they have divested themselves of ownership of the land which was their contribution to the pool.[119]

While it has been assumed by several writers that Mississippi has already indicated that its choice lies with the cross-conveyance theory, this assumption rests on slender precedents.[120]

In *Hudson v. Newell*,[121] an action to quiet title to a tract of unitized

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[117] 326 P.2d 1051 (Okla. 1958).

[118] 350 P.2d 970 (Okla. 1958), *cert. denied*, 364 U.S. 823 (1960).

[119] Annot., 13 Oil & Gas Rptr. 1008 (1961).

[120] Masterson, *supra* note 95.

> To that collection [cases applying the doctrine of cross-conveyancing] it is thought that the Mississippi case of Merrill Engineering Co. v. Capital National Bank should be added as having adopted the doctrine because of the view hereinafter taken of the nature of a running covenant in this situation, that being the apparent basis of decision in that case. *Id.* at 156.

See Custy and Knowlton, *Compulsory Field-Wide Unitization Comes to Mississippi*, 36 Miss. L.J. 123 (1965) [hereinafter cited as Custy].

> The choice in Mississippi, although still in doubt, will evidently be made in favor of the cross-conveyance theory, which is an "established rule of property in the State of Texas." This prediction is based almost exclusively upon two cases, one a federal decision and the other a Mississippi Supreme Court case, coupled with the long recognized tendency in Mississippi "to give special weight to Texas authority." *Id.* at 134-35.

[121] 172 F.2d 848 (5th Cir. 1949), *rev'd on rehearing*, 174 F.2d 546 (5th Cir. 1949).

oil land in Mississippi, the title to which was in question, the court first held that some of the defendants were participants in a unitization agreement covering such land, and therefore were interested and necessary parties. The court stated:

> The question of "unitization" and its connection with indispensable parties remains. A number of the claimants not joined have no interest unless through unitization of their lands with those in suit . . . . The question is whether the owners of other unitized lands acquired such an interest or title in those in suit as that they must be joined in order to grant even partial relief. *The district judge held that in Mississippi the oil in place is, as in Texas, conveyed by oil leases, royalty sales, and other formal recorded contracts, and that a unitization contract vests joint ownership jointly in all the unitized reserves in place and in the royalty oil produced from the well, citing Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472.* While no Mississippi authorities in point are cited, we believe this to be correct, so that all these owners must be parties, or the unitized lands must be excluded from any decree. No adoption by plaintiffs appears of the unitization of their lands.[122]

On rehearing, however, since the plaintiffs agreed to amend their pleadings to ratify the unitization agreements and to seek only to substitute themselves for their adversaries in title in such unitizations, without affecting the rights of other parties thereto, the court held that the plaintiffs would not be required to join other parties to the unitization contract as indispensable parties to the suit. This case assumes, without authority, that Mississippi would adopt the cross-conveyance theory merely because, like Texas, this state follows the ownership-in-place theory. Since in this state we have both a compulsory pooling statute and a compulsory unitization statute, there is normally no problem of necessary parties when the land involved is unitized under such a compulsory statute.[123] In such a situation, the outcome of a title suit as to one tract in the unit will not affect the interests of parties as to other tracts since the tract in question will be bound by the outcome, regardless of its ownership.[124]

The other case which has been cited as indicating Mississippi's adoption of the cross-conveyance theory is *Merrill Engineering Co. v. Capital Nat'l Bank*,[125] the facts of which have been given earlier. One authority reached this conclusion because "considerable emphasis was placed in the decision on such matters as the classification of royalty

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[122] *Id.* at 852.

[123] 6 WILLIAMS & MEYERS, *supra* note 1, § 928, at 536.

[124] *Id.*

[125] 192 Miss. 378, 5 So. 2d 666 (1942).

interests as real estate rather than personal property."[126] The Mississippi Supreme Court held that, upon a conveyance of a tract previously committed to the unit, the entire interest of the lessor in the unitized area being appurtenant to the tract contributed by him passes with the tract without mention of the unit. One writer[127] explains the court's decision on the theory of a covenant running with the land to share royalty payments rather than of cross-conveyance:

> The court proceeded to its conclusion apparently on the theory that there was a running covenant to share royalty payments on the agreed basis burdening each tract. The benefit of these covenants was held appurtenant to each tract so that it passed with a conveyance of the tract though unmentioned.[128]

Although a running covenant was not specifically mentioned, the following language of the court may have been the basis for such a conclusion:

> But, aside from this [contract] provision, it was contemplated that each block of the land should continue to be drained of oil or gas through such well or wells as might be produced on any part of the area, and we are of the opinion that in the absence of a reservation to the contrary, a subsequent grantee of any part of the pooled area would be entitled to the benefits to flow from the pooling or community agreement so long as it remained in force and effect against his land; and that this would be true without regard to whether or not such agreement made provision for the sharing of royalties by anyone other than the original parties thereto.[129]

One eminent authority,[130] while supporting the view that the unitizing agreement should be considered a sharing arrangement in the nature of a running covenant, believes that such an interpretation rules out the cross-conveyance theory, since no transfer of legal title would be involved in a running covenant:

> It is well to note that had the Texas court chosen to regard the effect of pooling as a sharing of production and operations, without a cross-conveyance of property interests, problems relating to the matter of parties to suits involving unit tracts

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[126] 6 WILLIAMS & MEYERS, *supra* note 1, § 930.4, at 568.

[127] Masterson, *supra* note 95.

[128] *Id.* at 159.

[129] Merrill Engineering Co. v. Capital Nat'l Bank, 192 Miss. 378, 398, 5 So. 2d 666, 672 (1942).

[130] HOFFMAN, *supra* note 110, at 161.

In a series of cases—most notably Veal v. Thomason, Brown v. Smith, and Leach v. Brown—the Texas courts have held that a pooling or unitization agreement constitutes a cross-conveyance among the owners in the unit of their real property interests with respect to the minerals involved. *Thus, the agreement is more than a covenant; it is also a conveyance.* (emphasis added). Hoffman, *Some Problems, supra* note 1, at 245-46.

> might also be avoided. Under the suggested analysis the lessor in each tract would retain all of the legal royalty interest in that tract but his agreement in the pooling arrangement to share with others the production from that tract as well as the production from the other tracts comprising the unit would be regarded as a covenant appurtenant to his royalty interest and running with the land.[131]

Commenting on the *Merrill Engineering Co.* case, Mr. Hoffman states:

> It must be recognized, of course, that the Mississippi court has not held, as has the California court, that the act of pooling effects a cross-conveyance of the real property interests among the royalty owners. *Thus the Mississippi court found it somewhat easier to arrive at the result which it did by treating the sharing arrangement imposed by the pooling agreement as a simple covenant running with the title to the respective tracts comprising the unit.* (emphasis added).[132]

Professor Masterson disagrees with Mr. Hoffman and states that "the analysis of the unitizing agreement as a running covenant is completely consistent with the doctrine of cross-conveyancing."[133] In support of his position, he draws an analogy between the operation of an entirety clause and the operation of a unitizing agreement and states that "an entirety clause has been specifically held to be a covenant running with the land."[134]

He also argues:

> Considering the unitizing agreement, whatever form it may take, as a running covenant eliminates the objection to the sufficiency of the agreement as a conveyance due to the absence of words of grant. And yet it is believed that the situation is the same as if a cross conveyance had occurred. It has been stated that ". . . a covenant running with the land is treated as a contract and not a property interest in a court of law . . . ."[135]
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> A running covenant is frequently referred to as a "right in the land of another."[136] Thus though the unitizing agreement be considered a running covenant, the situation after the making of the agreement is that each party to the unitized area has acquired an interest in the lands of the other parties. As afore-

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[131] HOFFMAN, *supra* note 110, at 161-62.

[132] *Id.* at 180.

[133] Masterson, *supra* note 95, at 161.

[134] *Id.* at 160, *citing* Gypsy Oil Co. v. Schonwald, 107 Okla. 253, 258, 231 P. 864, 868 (1924); Hardwicke, *supra* note 80, at 672-73.

[135] *Id.* at 160, *citing* 2 AMERICAN LAW OF PROPERTY 364 (A. Casner ed. 1952).

[136] *Citing* C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" 2 n.5 (2d ed. 1947) [hereinafter cited as CLARK].

said, to deny that this real interest was acquired by a cross conveyance is simply to use another term for the process that has heretofore been called a "conveyance."[137]

Of the two theories—cross-conveyance or running covenant—the latter appears to be more flexible for adoption in Mississippi. Under this theory, there would be no transfer of legal title to the royalty under the various tracts in the unitized area. Since royalty is considered to be a corporeal interest in realty in this state, a running covenant could be created benefiting or burdening the royalty interest regardless of who owns it or has possession of it. A covenant has been defined as "an agreement between two or more persons to do or permit the doing of a particular act . . . . It is a promise, an agreement or a contract, and formerly was a contract under seal."[138]

The fundamental requirements of a real covenant are that it must be in writing, signed and sealed by the promisor; the promise must "touch" or concern the land; and there must exist "privity of estate."[139] "Privity of estate" means "succession to the estate of one of the parties to the covenant."[140] It is what distinguishes a real covenant from an interest "in the land of another," such as an easement or profit.[141]

Regardless of which theory is adopted—cross-conveyance or real covenant—technical difficulties are often encountered in trying to fit oil and gas law into particular common law property concepts. Why not ignore both of these theories and simply regard this matter as *sui generis*?

The question of whether the executive has the power to pool as well as to lease has not been raised in Mississippi, and therefore this state has an opportunity to evaluate the decisions in other jurisdictions which have considered this question and perhaps to benefit from their experience. In Texas it has been held that the power to lease does not include

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[137] Masterson, *supra* note 95, at 161.

[138] 7 THOMPSON, *supra* note 30, § 3150, at 59.

[139] CLARK, *supra* note 136, at 92, 94, 95.

[140] *Id.* at 111.

[141] Clark states:

As we shall see, the basic element of this requirement is what distinguishes a real covenant—a covenant so connected with realty that either the right to enforce or the duty to perform passes to assigns of the land—from an interest "in the land of another," such as an easement or profit. An easement is, in theory, considered as if attached to the land itself so as to pass with it, even in favor of or against disseisors; while a real covenant passes only to successors to the estate—privies in estate—of either of the original contracting parties. The basis of transfer of an easement interest is the taking of the land; the basis of transfer of a real covenant is succession to a particular estate in the land. Hence "privity of estate" is a means of explaining and justifying the transfer of certain legal benefits and obligations. *Id.* at 93-94.

the power to pool.[142] *Brown v. Smith*,[143] decided in 1943, was the first case to so limit the scope of the exclusive-leasing privilege.

In this case, the owner of a 1/32 perpetual, non-participating royalty interest in a 20-acre tract refused to join in a pooling of such tract with an adjoining 42.75-acre tract. The lessee objected to taking the lease, and the court denied relief to the lessors, on the ground that this was not the lease for which the lessee had bargained. The court also stated that when Mrs. Lee had conveyed the 20-acre tract to Smith, reserving a 1/32 royalty interest, she contemplated the leasing of the land for production, but that "it does not follow that Mrs. Lee's deed invested her grantee with the right or authority to pool her royalties with royalties from other land that might thereafter be included with it in a lease."[144] The court held that Mrs. Lee's interest would not be affected by the pooling agreement in the lease executed by the holder of the exclusive leasing privilege, since otherwise a cross-conveyance would have resulted:

> Had Mrs. Lee, the owner of the outstanding royalty interest in the 20-acre tract, joined in the execution of the oil and gas lease, she would have become a party to the pooling agreement contained in the lease and *thereby, in effect, she would have conveyed to the owner of the 42.75 acres a part of her interest in the royalty in the 20 acres and would have become the owner of an undivided interest in the royalty in the 42.75 acres.* Since Mrs. Lee did not join in the lease, the execution and delivery of it by Floyd and Ector Smith would neither divest her of any part of her royalty interest in the 20-acre tract nor vest in her any interest in the royalty in the 42.75 acres . . . . (emphasis added).[145]

Nugent v. Freeman[146] followed the rule laid down in the *Brown* case that the holder of the exclusive leasing right had no authority to pool an outstanding royalty interest and further held that the royalty owner had done nothing in the way of ratifying the pooling arrangement until long after the lease had been completely developed.

In *Minchen v. Fields*[147] the Texas court, citing the *Brown* and *Nugent* cases, held that the act of Fields, owner of the executive right, in executing one lease covering 802.6 acres in three separately described tracts of land, including an outstanding non-executive mineral interest

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[142] Minchen v. Fields, 162 Tex. 73, 345 S.W.2d 282 (1961); Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943); Nugent v. Freeman, 306 S.W.2d 167 (Tex. Civ. App. 1957).

[143] 141 Tex. 425, 174 S.W.2d 43 (1943).

[144] *Id.* at 430, 174 S.W.2d at 46.

[145] *Id.*

[146] 306 S.W.2d 167 (Tex. Civ. App. 1957).

[147] 162 Tex. 73, 345 S.W.2d 282 (1961).

in one tract, did not unitize or pool all of the mineral interests in said land. The Supreme Court of Texas quoted with approval the reason for the rule as stated by the Court of Civil Appeals:

> [T]he reason of the rule is that where mere executive rights are conferred or reserved, there is no intention evidenced to vest authority to convey a royalty interest reserved or the royalty interest attributable to the minerals leased, and to hold that such holder can unitize or pool the interest would allow him to convey such royalty interest, *because a unitization of the royalty and minerals under different tracts effects a cross-conveyance to the owners of minerals under the various tracts of royalty or minerals so that they all own undivided interests under the unitized tract in the proportion their contribution bears to the unitized tract.* Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472. (emphasis added).[148]

A contrary result has been reached in Louisiana, where the exclusive-leasing power includes the power to pool the interests of non-participating royalty owners. The Louisiana rule was asserted in *LeBlanc v. Haynesville Mercantile Co.*[149] In that case, the court stated:

> It follows that the defendant was not a necessary party to the lease [citations omitted], the landowners having full power to enter into any lease contract they saw fit affecting the property —and that would include the power to grant a lessee the authority to pool and combine the leased acreage or any portion thereof with any lands or leases and mineral interests in the immediate vicinity—subject only to the right of the royalty owner to receive its 1/64th of the oil, gas and other minerals allocated to the acreage included in the unit.[150]

Oklahoma's position is closer to that taken in Texas, although, like Louisiana, it appears to reject the cross-conveyance theory of titles held in units.[151] In *Stroud v. D-X Sunray Oil Company*,[152] the Oklahoma Supreme Court cited the Texas cases of *Minchen v. Fields, Brown v. Smith*, and *Nugent v. Freeman* as precedents for its decision that, under the facts of that case, the exercise by the grantor of a non-participating royalty interest of his reserved right to grant an oil and gas lease covering such interest, which lease also covered minerals owned by him, did not evidence an intention on his part to pool the production from the combined tracts under the lease. The language of the entirety clause of the oil and gas lease to the effect that "If leased premises shall hereafter be

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[148] *Id.* at 77, 345 S.W.2d at 285.

[149] 230 La. 299, 88 So. 2d 377 (1956).

[150] *Id.* at 307, 88 So. 2d at 380.

[151] *See* Garvin v. Pettigrew, 350 P.2d 970 (Okla. 1958), *cert. denied*, 364 U.S. 823 (1960).

[152] 376 P.2d 1015 (Okla. 1962).

owned in severalty . . . ."[153] apparently influenced the decision, since the court held that such a clause did not apply to a non-participating interest *previously* conveyed by the lessor, and that such a provision does not evidence an intention to pool production, for the reason that such clause relates only to subsequent changes in ownership. The court concluded:

> Since the entirety clause before us is not so worded as to evidence an intent on the part of Maddie Gaines to pool production from the S/2 of NE/4, (assuming that she had this lawyer) a pooling can only be said to have arisen if the reservation of executive powers by Maddie Gaines in her mineral conveyance to Mr. Chrystal served to establish the intent of the parties thereto that upon exercise of such power a cross-conveyance of minerals during term of lease under the SE/4 of NE/4 and SW/4 of NE/4 and a pooling of production from the two 40's would result. In holding that a pooling does not result in such instances, the Supreme Court of Texas said in Minchen v. Fields et al., 345 S.W.2d 282, 285, that "We agree with the Court of Civil Appeals that the act of Fields in executing one lease covering the 802.6 acres did not unitize or pool all of the mineral interests in said land. (Citing *Brown* and *Nugent* cases and quoting in full the "reason of the rule" paragraph quoted above from the *Minchen* case.)[154]

Chief Justice Blackbird, in a well-reasoned dissenting opinion, sharply disagreed with the majority, labeling the "executive rights" rule based on Texas cases as "unsound" and "inapplicable" to Oklahoma. He stated:

> While there may be an historic reason for fabricating a theory, or fiction, of "cross-conveyancing" to sustain the apportionment of royalty rule in States like Texas and Arkansas, which subscribe to the ownership of oil in place doctrine (see Osborn v. Arkansas Territorial Oil & Gas Development Co., 103 Ark. 175, 146 S.W. 122), I do not think it is necessary to find such a theory on which to sustain it in Oklahoma, where the "recovery" right to natural oil and gas deposits has been referred to as a profit a prendre, connoting only qualified (as distinguished from absolute) ownership of an incorporeal (rather than a corporeal) hereditament (Rich v. Doneghey, 71 Okla. 204, 177 P. 86, 89, 3 A.L.R. 352). Many of this court's early decisions, and all of our later ones, deal in an enlightened manner with, and are attuned to, the recognized fugitive nature of oil and gas, and the correlative rights of adjoining owners in a common source of oil and gas supply. See Panhandle Eastern Pipe Line Co. v. Corp. Comm., Okla., 285 P.2d 847, 853.[155]

It was also held in this case that ratification of the lease by the owners

[153] *Id.* at 1017.
[154] *Id.* at 1019.
[155] *Id.* at 1021.

of non-participating royalty did not operate to grant the ratifiers an interest in the minerals owned by the lessor since under the particular entirety clause the lessor did not intend to pool the non-executive interests which had been severed *before* execution of the lease.

Although, after *Minchen*, the cross-conveyance doctrine appeared to be well-established in Texas, several recent cases[156] appear to have eroded the no-pooling rule laid down in *Brown v. Smith*.

Professors Williams and Meyers have urged that the Louisiana position on this subject is preferable to the Texas rule,[157] on the ground that "such agreements are becoming more common with the recognition that both public and private interests are best protected by pooled and unitized operations" and that "frequently, if not usually, pooling or unitization is 'prudent' development of the premises."[158] The position taken by Professors Williams and Meyers carries the proviso that the term royalty owner be adequately protected, so that "if all or part of Blackacre, in which a term royalty interest exists, is included by the executive in a unit, production on the unit whether on or off Blackacre suffices to extend the life of the royalty interest into the secondary term both as to the portions of Blackacre included and excluded from the unit . . . ."[159] In a recent article attacking the Texas rule,[160] Professor Williams suggests that the Texas Supreme Court should overrule *Brown*

[156] Mathews v. Sun Oil Co., 425 S.W.2d 330 (Tex. 1968). The executive combined two tracts in one lease when the holders of non-participating royalty interests were not identical. The court held that this was a single, or consolidated, lease, and no pooling problem was involved. While reiterating the view that the holder of the executive rights may not convey the reserved royalty interest, the court stated: "The distinction between the inclusion of two tracts in one lease by the holder of a leasing power and the pooling of royalty interests is that the execution of a lease is an authorized act, while pooling and the cross-conveying of royalty interests is an unauthorized act. . . ." *Id.* at 333. In Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968), the court held that the nonexecutive owner had ratified the executive's lease, which included a pooling and an entirety clause, and that he was, therefore, entitled to a share of the production.

[157] 2 WILLIAMS & MEYERS, *supra* note 1, § 339.3, at 221. For a contrary view, preferring the Texas rule, and contending that it would be unjust to force the non-executive interests into a voluntary unit against their will, see MYERS, *supra* note 1, § 4.07, at 131.

> I have consistently advocated compulsory pooling as a cure for some of the ills in the oil and gas industry, but only as administered by an established conservation agency under statutes providing for notice and hearing and for protection of the rights of all parties who have previously failed to establish a voluntary unit. It is a far cry from this to say that the power to force-pool should be placed in the hands of a private individual under a written instrument that does not mention pooling and with no safeguards or limitations except as to royalty. *Id.* at 133-34.

[158] Williams and Meyers, *Impact of Pooling*, *supra* note 1, at 412.

[159] *Id.* at 429.

[160] Williams, *Stare Decisis*, *supra* note 1.

v. Smith and allow the executive to pool as well as lease non-executive interests unless prohibited from doing so by language in the instrument creating such interest. He states that the decision has been "overtaken by events," and that:

> Although Rule-37-exception wells are still being drilled, close spacing and small tract drilling no longer characterize development practice. Today one who acquires, or reserves from the conveyance of a greater interest, a nonexecutive interest in production is well aware that his interest may be pooled, and in many states, unitized, without his assent through the use of compulsory process. And because of the impetus provided by the availability of compulsory pooling process, voluntary pooling and unitization agreements are becoming increasingly common, and pooling clauses are found in an increasing number of contemporary leases.[161]

He also proposes three specific rulings for adoption by the court:

1. An executive has power to pool royalty and non-executive mineral interests with other interests in the same or different premises.
2. An executive has power to execute leases containing commonplace clauses, such as pooling clauses, shut-in gas royalty clauses, entirety clauses, dry hole clauses, drilling operations clauses, *force majeure* clauses, and so on.
3. The clauses of the lease that the executive has executed should be treated as amendments to the instrument creating the royalty or non-executive mineral interest when the interest of the non-executive would be adversely affected otherwise. Thus, when the executive power relates to a defeasible term royalty or non-executive mineral interest, a shut-in royalty clause in the executive's lease should also be incorporated into the instrument creating the defeasible term interest; otherwise, the executive gains at the expense of the nonexecutive, since the lease can be kept alive while the defeasible term interest is being washed out. The justification for this position is that it provides a practical and inexpensive remedy for the enforcement of the duty of fair dealing. Similarly, the pooling clause of the executive's lease should be incorporated into the instrument creating the royalty or non-executive mineral interest so that production in the unit preserves both the lease and the defeasible term interest and so that executive and nonexecutive share production from the unit on the same basis.[162]

We agree with the conclusion of Professor Williams that a "jurisdiction having both compulsory pooling and compulsory unitization should reject *Brown v. Smith* whatever the view taken in that jurisdiction

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[161] *Id.* at 1030.

[162] *Id.* at 1014.

as to apportionment of royalties."[163] Ours is a jurisdiction which has favored apportionment of royalties under "equitable pooling" principles.[164] Mississippi also has a compulsory pooling statute.[165] Under this statute, after notice and public hearing,[166] the State Oil and Gas Board has the power to order the integration of all mineral interests in a single drilling unit, resulting in apportionment of royalties on the basis of the acreage contributed to the unit. Consequently, after a lease has been executed by the executive, the lessee may, by applying to the Board, "pool" even though the lease lacks a pooling clause, without obtaining the consent of owners of non-executive interests.

Also, since 1964 Mississippi has had a compulsory unitization law[167] covering unit operation of an entire field, or of an entire pool or pools within a field. Any interested person may apply to the State Oil and Gas Board and, after notice and hearing, the Board may issue an order requiring such unit operation if necessary in order to effectively carry on any form of joint effort calculated to increase substantially the ultimate recovery of oil and gas from the unit.[168] Such an order, to be effective, requires the approval in writing of at least 85% of the owners or lessees based on surface acreage content of the unit area, and also 85% of the royalty owners.[169] The non-participating royalty owners or non-executive mineral owners would rarely amount to as much as 15% of the total royalty owners involved. Therefore, the lessee, under this

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[163] *Id.* at 1031.

[164] Griffith v. Gulf Refining Co., 215 Miss. 15, 60 So. 2d 518 (1952).

[165] The statute reads, in part:

> When two or more separately owned tracts of land are embraced within an established drilling unit, the persons owning the drilling rights therein and the rights to share in the production therefrom may validly agree to integrate their interests and to develop their lands as a drilling unit. Where, however, such persons have not agreed to integrate their interests, the board may, for the prevention of waste or to avoid the drilling of unnecessary wells require such persons to integrate their interests and to develop their lands as a drilling unit. All orders requiring such pooling shall be made after notice and hearing, and shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense.
>
> The portion of the production allocated to the owner of each tract included in a drilling unit formed by a pooling order shall, when produced, be considered as if it had been produced from such tract by a well drilled thereon. . . . MISS. CODE ANN. § 6132-22 (a) (1956).

See Coleman, *The New Mississippi Oil and Gas Conservation Act*, 20 MISS. L.J. 51 (1948); Winter, *The Work of the 1950 Session of the Mississippi Legislature*, 22 MISS. L.J. 1 (1950).

[166] MISS. CODE ANN. § 6132-12 (Supp. 1968).

[167] MISS. CODE ANN. § 6132-101 through 112 (Supp. 1968). *See* Custy, *supra* note 120.

[168] MISS. CODE ANN. § 6132-102 (Supp. 1968).

[169] MISS. CODE ANN. § 6132-104 (Supp. 1968).

statute, may in most cases proceed with unitization without the consent of the non-executive interests. It is submitted, therefore, that in Mississippi the right to pool or unitize as well as lease has been endorsed by conservation legislation, and if and when such question is presented to the court relative to a voluntary pooling agreement, such a privilege should be extended to the person holding the exclusive right to lease.

III.

Duty of the Executive Toward Non-Executive Interests[170]

Since the non-executive interests are dependent to such a great extent on the owner of the executive right, the weight of authority (with the possible exception of Louisiana) recognizes that the executive has an implied duty toward the non-executive interests in the exercise of the executive right.[171] This, of course, is in addition to the normal duties which he owes to all other persons, such as to refrain from fraudulent misrepresentations. The owner of the executive right has other duties

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[170] *See generally* 1 KUNTZ, *supra* note 1, § 15.7, at 351-53; 2 WILLIAMS & MEYERS, *supra* note 1, § 339.2-339.3; Everett, *supra* note 1; Jones, *Executive Rights, supra* note 1, at 82-112; Jones, *Non-Participating Royalty, supra* note 1, at 575-96; Jones, *Problems, supra* note 1, at 294-99; Martz, *supra* note 1, at 202-16; Williams, *Fiduciary Principle, supra* note 1.

[171] Cases holding or assuming that there exists a duty on the part of the executive are found in Alabama, Arkansas, Kansas, Texas and West Virginia. *E.g.*, Wright v. Brush, 115 F.2d 265 (10th Cir. 1940); Teas v. Twentieth Century-Fox Film Corp., 178 F. Supp. 742 (N.D. Tex. 1959), *rev'd*, Twentieth Century-Fox Film Corp. v. Teas, 286 F.2d 373 (5th Cir. 1961), *cert. denied*, 368 U.S. 818; Union Producing Co. v. Scott, 173 F. Supp. 361 (S.D. Tex. 1958), *aff'd*, Scott v. Union Producing Co., 267 F.2d 469 (5th Cir. 1959), *cert. denied*, 363 U.S. 842 (1960); Hudgins v. Lincoln Nat'l. Life Ins. Co., 144 F. Supp. 192 (E.D. Tex. 1956); Federal Land Bank of Houston v. United States, 168 F. Supp. 788 (Ct. Cl. Tex. 1958); McCall v. Nettles, 251 Ala. 349, 37 So. 2d 635 (1948); Hanson v. Ware, 224 Ark. 430, 274 S.W.2d 359 (1955); Wagner v. Sunray Mid-Continent Oil Co., 182 Kan. 81, 318 P.2d 1039 (1957); Wilson v. Holm, 164 Kan. 229, 188 P.2d 899 (1948); Montgomery v. Ritterbacher, 424 S.W.2d 210 (Tex. 1968); Delta Drilling Co. v. Simmons, 161 Tex. 122, 338 S.W.2d 143 (1960); Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943); Wintermann v. McDonald, 129 Tex. 275, 102 S.W.2d 167 (1937); Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937); Scaling v. Beggs, 334 S.W.2d 209 (Tex. Civ. App. 1960); Midwest Oil Corp. v. Winsauer, 315 S.W.2d 608 (Tex. Civ. App. 1958), *rev'd on other grounds*, 159 Tex. 560, 323 S.W.2d 944 (1959); Nugent v. Freeman, 306 S.W.2d 167 (Tex. Civ. App. 1957); Allison v. Smith, 278 S.W.2d 940 (Tex. Civ. App. 1955); Morriss v. First Nat'l. Bank of Mission, 249 S.W.2d 269 (Tex. Civ. App. 1952); Pinchback v. Gulf Oil Corp., 242 S.W.2d 242 (Tex. Civ. App. 1951); First Nat'l. Bank of Snyder v. Evans, 169 S.W.2d 754 (Tex. Civ. App. 1943); Lamp v. Locke, 89 W. Va. 138, 108 S.E. 889 (1921).

which arise through the relation which has been created by a reservation or granting of the exclusive right to lease. The main controversy has centered around the nature of the duty, if any, and this has not been established with certainty in the cases. As Mississippi Supreme Court Chief Justice W. N. Ethridge, Jr. stated in his address delivered at the 1967 meeting of the Oil and Gas Committee of the Mississippi Bar, on the subject "The Reasonable Man In Oil and Gas Law":

> The existence of these duties, their nature, the tests to be applied, and their application in specific controversies represent perhaps the most important single, recent development in oil and gas law. The pertinent law is in its formative stages.

The suggested standard of duty for the executive has varied among (1) the fiduciary responsibility of a trustee;[172] (2) the duty of "utmost fair dealing";[173] (3) that of ordinary care and good faith, generally considered to be a contractual, rather than a fiduciary, standard of conduct.[174] The Texas courts have favored the standard of utmost fair dealing, which is said to fall between a high fiduciary duty and a low standard of ordinary care and good faith.[175] This view has been endorsed by a leading writer, Lee Jones, Jr.[176]

Williams and Meyers interpret this standard as "an ordinary, prudent landowner test. The executive is required to exercise his exclusive leasing power in the same manner as an ordinary, prudent landowner would exercise the leasing power inherent in the mineral fee. The executive's conduct will be judged by such standard, as if no royalty or

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[172] McCall v. Nettles, 251 Ala. 349, 37 So. 2d 635 (1948). By way of dictum, the court suggested a standard of "the same good faith, care and diligence, which controls a trustee in performing the duties of the trust." *Id.* at 352, 37 So. 2d at 637.

[173] Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937). The Texas court stated: "We think that self-interest on the part of the grantee may be trusted to protect the grantor as to the amount of royalty reserved. Of course, there should be the utmost fair dealing on the part of the grantee in this regard." *Id.* at 631, 101 S.W.2d at 543.

[174] This standard was also suggested by a Texas case, Wintermann v. McDonald, 129 Tex. 275, 102 S.W.2d 167 (1937). *Accord*, Warren v. Amerada Petroleum Corp., 211 S.W.2d 314 (Tex. Civ. App. 1948), in which the duty was to be discharged with prudence and good faith, and with ordinary care and diligence.

[175] Delta Drilling Co. v. Simmons, 161 Tex. 122, 338 S.W.2d 143 (1960), followed the Schlittler decision.

[176] Jones, *Executive Rights*, *supra* note 1. "With the possible exception of Louisiana, the courts of all other jurisdictions which have spoken on the subject have either held or assumed that the executive is under some sort of a duty to the non-executive; however, Louisiana's leading text writer, Prof. Daggett, contends that Louisiana could and should impose duties on the executive in the exercise of the executive rights in connection with both non-participating royalty interests and non-executive mineral interests." *Id.* at 90; Jones, *Non-Participating Royalty*, 26 Texas L. Rev. 569, 574 (1948).

non-executive mineral interest were outstanding."[177] Such a standard was defined in *Federal Land Bank of Houston v. United States*:[178]

> We believe as between the mineral fee owner and the royalty owner there is an implied covenant in the deed that the mineral fee owner will use the utmost fair dealing and diligence in obtaining lease agreements in order to protect the royalty owner's interest.
>
> What then would be "utmost fair dealing and diligence" in the circumstance of this case? We are of the opinion that the court should require the same degree of diligence and discretion on the part of the mineral fee holder as would be expected of the average land owner who because of self-interest is normally willing to take affirmative steps to cooperate with a prospective lessee. See 26 Tex. L. Rev. 569.[179]

This case concerned a term royalty interest which expired after 20 years. The land was purchased by the United States Government subject to the non-participating royalty interest, and suit was brought by the term owner to recover damages for loss of royalty as a result of the executive's delay in exercising its leasing power. The Court of Claims held that the plaintiff was entitled to damages to be measured by the amount of oil actually taken from the land in question. The court stated as follows:

> The implied covenant of utmost fair dealing and diligence in the case of a royalty interest for a term of years would require this court to impose a somewhat more stringent rule than in the case of an agreement not limited by time. This is necessarily so because the mineral owner cannot be permitted to reduce the value of the royalty interest by inaction which would eventually inure to its benefit.[180]

Professor Eugene O. Kuntz has suggested that, although the holder of the power should not be held to the high standard of a fiduciary, it would be reasonable to apply a standard similar to the one applied to trustees under the prudent investor rule adopted in many states:

> Under such standard, the holder of the power would be required to exercise the judgment and care, in the circumstances then prevailing, which men of prudence, discretion, and diligence exercise in the management of their own affairs, taking into account the rights of all owners of interests in the minerals to various types of payments.[181]

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[177] 2 WILLIAMS & MEYERS, *supra* note 1, § 339.2, at 203-04.

[178] 168 F. Supp. 788 (Ct. Cl. Tex. 1958).

[179] *Id.* at 791.

[180] *Id.*

[181] 1 KUNTZ, *supra* note 1, § 15.7, at 352-53.

However, he has expressed his preference that the duty should be to use "utmost fair dealing and diligence" in the exercise of the power.[182]

It is generally agreed that the standard should be a compromise between a fiduciary duty and a duty of ordinary care.[183] In his address referred to above, Chief Justice Ethridge concluded:

> The standard of dealing required of an executive will probably be determined by the majority of courts to be less than that of the fiduciary and more than that of ordinary care under contract principles. Somewhere between these two standards the majority of courts will probably apply what amounts to a standard of what an ordinary prudent landowner would do in leasing his own property.

It has been pointed out by one leading writer[184] on this subject that "although this compromise standard of conduct may well be the best formula to use as a uniform guide, it should be noted that the variety of standards listed above were imposed in cases with significant factual differences." Beyond conceding that the owner of the executive right should refrain from deliberately extinguishing or diminishing the value of outstanding interests, he suggests a flexible test, as follows:

> Beyond that, however, an objective test should be applied, requiring only that the leasing power be exercised in the manner that an ordinary prudent lessor would under similar circumstances. Under this standard, considerable flexibility is provided by the factor "under the circumstances." This should adequately meet variations such as different types of outstanding interests (e.g., term mineral interests or perpetual royalty), desirability of the area, or strength of bargaining position of the parties.[185]

It has been suggested that the holder of the executive right has at least three implied obligations to the non-executive interests, and that the exercise of such a right would include fair dealing in (1) a timely exercise of the power to lease; (2) fixing the terms and payments under the lease; and (3) enforcing the implied lease covenants for the benefit of the non-executive owner.[186] Remedies for the breach of such duties by the executive should include an action for damages,[187] a suit for ref-

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[182] *Id.* at 352.

[183] 2 WILLIAMS & MEYERS, *supra* note 1, § 339.3, at 216; Jones, *Non-Participating Royalty*, *supra* note 1.

[184] Elliott, *supra* note 1.

[185] *Id.* at 874.

[186] *See* 1 KUNTZ, *supra* note 1, § 15.7, at 352; 2 WILLIAMS & MEYERS, *supra* note 1, § 339.3, at 205-21; Jones, *Non-Participating Royalty*, *supra* note 1; Williams, *Fiduciary Principle*, *supra* note 1, at 243-47.

[187] Federal Land Bank of Houston v. United States, 168 F. Supp. 788 (Ct. Cl. Tex. 1958).

ormation or cancellation of the lease,[188] injunctive relief,[189] specific performance, or the impression of a constructive trust.[190]

Some specific applications of the principle of implied obligations of the executive toward the non-executive interests have been found in other jurisdictions. In *Federal Land Bank of Houston v. United States*[191] the court, in awarding damages to the non-participating royalty owner, held that the Government had violated the "fair dealing and diligence" rule in failing to lease for drilling without unnecessary delay, where it is known, or there is a reasonable likelihood, that oil is being drained by drilling operations on adjacent land.

The terms of a lease include agreements as to the amount of bonus, delay rentals and royalty to be paid thereunder. The holder of the executive right may attempt to circumvent the provisions of the instrument creating the non-executive interest by entering into arrangements with the lessee which may be detrimental to the non-executive. However, it has been held that, even though a bonus was specified in the deed, the exercise of the leasing power was reasonable and in good faith where the executive required a well to be drilled in lieu of a bonus.[192] The usual royalty is one-eighth and, even though the grant or reservation does not so provide, fair dealing would seem to require the executive to reserve at least one-eighth royalty in any lease negotiated by him.[193] In one case[194] the agreement between the executive and the non-executive provided that the latter was to receive an 8-1/3 per cent royalty and 50 per cent of any bonus received for a lease. In negotiating the lease, the executive arranged for a royalty of 20 per cent and, instead of a bonus, an interest described as a "variable participating royalty." The court stated that it was obviously a valuable oil property and the executive could have secured a bonus in which the non-executive would share. Therefore, it was held that the non-executive was entitled to 50

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[188] 1 KUNTZ, *supra* note 1, § 15.7, at 353. "Where the lessee has knowingly participated in a violation of the duty. . . ." *Id.*

[189] Lamp v. Locke, 89 W. Va. 138, 108 S.E. 889 (1921); Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562, (Tex. Civ. App. 1959).

[190] Andretta v. West, 415 S.W.2d 638 (Tex. 1967); Jones, *Non-Participating Royalty, supra* note 1, at 575-96.

[191] 168 F. Supp. 788 (Ct. Cl. Tex. 1958). *See also* Hanson v. Ware, 224 Ark. 430, 274 S.W.2d 359 (1955); Moore v. City of Beaumont, 195 S.W.2d 968 (Tex. Civ. App. 1946), *aff'd*, 146 Tex. 46, 202 S.W.2d 448 (1947).

[192] Allison v. Smith, 278 S.W.2d 940 (Tex. Civ. App. 1955).

[193] Jones, *Non-Participating Royalty, supra* note 1, 575-76. *See* Odstrcil v. McGlaun, 230 S.W.2d 353 (Tex. Civ. App. 1950).

[194] Teas v. Twentieth Century-Fox Film Corp., 178 F. Supp. 742 (N.D. Tex. 1959), *rev'd.*, Twentieth Century-Fox Film Corp. v. Teas, 286 F.2d 373 (5th Cir. 1961), *cert. denied*, 368 U.S. 818.

per cent of the so-called "variable participating royalty" on the ground that such "royalty" was bonus.

In a recent Texas case[195] the executive, West, leased the land and later conveyed a 1/4 non-participating royalty interest which was finally acquired by Andretta, the plaintiff. The land did not produce but there was production on adjoining land. An agreement was reached between West and the lessee whereby the latter agreed to pay West a lieu royalty in cash equivalent to 1/8th of the proceeds from the sale of all oil produced from the well on the adjoining tract. The agreement stipulated that these payments would be construed as royalty payments under the lease and were paid for the sole purpose of maintaining it in full force and effect until a well would be started on the West lease. When he learned about the agreement, Andretta sued West for his 1/4 share of the royalty. The Texas Supreme Court held that the payments under the agreement were not rental but constituted royalty in which Andretta was entitled to share, and that the executive held the 1/4th outstanding interest as a constructive trustee. While this case is properly, we think, to be restricted fairly closely to its facts, it does point to a developing trend in this relation.

The third implied obligation mentioned above is that the executive owes a duty to the non-executive to promote development of the mineral property in which both share. The courts have not looked with favor upon attempts by the executive to deprive the non-executive of his expectancy under a lease. In one case[196] it was held that after one well had been drilled on a portion of the leased acreage other than the subdivided portion in which the non-executive had a mineral interest, the non-executive was entitled to a share of the sum paid to the executive in lieu of further development of the premises.[197] In another case,[198] the non-executive shared in the royalty but not in rentals. The court held that large delay rentals in the same amount as the annual royalty on a gas well were a substitute for royalty and that the non-executive was entitled to share in the payment made by the lessee in lieu of drilling.

It has been suggested by many authorities that perhaps the best and simplest way is to allow the non-participating owner to enforce the implied covenants directly against the lessee rather than go the indirect route through the lessor, who for many reasons, e.g., financial, might not be in a position to sue the lessee.[199]

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[195] Andretta v. West, 415 S.W.2d 638 (Tex. 1967).

[196] Robinson v. Milam, 125 W. Va. 218, 24 S.E.2d 236 (1942).

[197] *See also* Maynard v. Ratliff, 297 Ky. 127, 179 S.W.2d 200 (1944).

[198] *Id.*

[199] 2 WILLIAMS & MEYERS, *supra* note 1, § 339.3, at 216-19; Jones, *Non-Participating Royalty*, *supra* note 1, at 593-96; Williams, *Fiduciary Principle*, *supra* note 1, at 247

In *Gardner v. Boagni*,[200] a consolidated action in Louisiana, the Louisiana Supreme Court reiterated its previous position that the executive rights holder owes no fiduciary duty to the non-executive interests, although this case really turned on the construction of a partition agreement among four heirs. Under the partition agreement the surface owner was granted exclusive leasing rights and the right to receive any "bonuses, rentals and other considerations (except royalties)" paid for or in connection with any lease. The agreement further provided that the non-executive royalty interests should participate, in specified percentages, in "excess royalties" if the executive granted a lease for royalties in excess of 1/8. The lease provided for a 1/8 royalty, and in lieu of a $52,000 bonus the executive agreed to receive an overriding royalty to be paid out of the 7/8 working interest. The court ruled that the executive was entitled to the overriding royalty. The non-executive group suggested that the executive power held by the other group placed them in a fiduciary capacity with regard to all of the royalty owners and that it was incumbent on the executive to obtain the best "deal" for them, which would require that he accept all the consideration in the form of direct royalties in and under the lease rather than take some of the benefits as an overriding royalty. The court, citing *Uzee v. Bollinger*,[201] a previous Louisiana decision, stated:

> In the opinion in that case the Court of Appeals analyzed prior decisions of this Court, as well as those from the other Courts of Appeal touching on the subject, and it concluded that ". . . Louisiana has rejected the doctrine of implied agency and fiduciary relationship as between the owner of royalty interest and the owner of the right to lease the land for mineral purposes. . . ."[202]

(1962). The right of non-executive mineral owners and non-participating royalty owners to enforce the implied lease covenants against the lessee is based upon the third party beneficiary doctrine of contract law as to pre-lease interests, and upon the real property doctrine of covenants running with the land as to post-lease interests. Damages will commonly be the remedy sought by a non-participating owner. 5 WILLIAMS & MEYERS, *supra* note 1, § 874.2, at 496. Pre-lease case authority: Spiner v. Phillips Petroleum Co., 94 F. Supp. 273 (W.D. La. 1950) (denying owner of a term royalty interest the right to enforce the protection covenant against the lessee); Lamp v. Locke, 89 W. Va. 138, 108 S.E. 880 (1921) (allowing fixed term royalty owner to sue and granting mandatory injunction requiring lessee to drill an offset well). Post-lease case authority: Compton v. Fisher-McCall, Inc., 298 Mich. 648, 299 N.W. 750 (1941) (implication in court's decision that a non-participating royalty owner could maintain a separate action for damages for breach of the protection covenant); Warren v. Amerado Petroleum Corp., 211 S.W.2d 314 (Tex. Civ. App. 1948) (dictum suggesting that an owner of a defeasible term royalty interest has the same right as the lessor to enforce implied covenants).

[200] 252 La. 30, 209 So. 2d 11 (1968).

[201] 178 So. 2d 508 (La. App. 1965).

[202] Gardner v. Boagni, 209 So. 2d 11, 15 (La. 1968).

The court stated that the executive had done everything he was obligated to do under the partition agreement. After that, he was free to negotiate for his own benefit. In this particular instance the decision seems correct, since the executive could easily have received the $52,000 as a cash bonus and the form in which he received it is not important. There was no evidence of bad faith on his part.

No Mississippi case has been found which defines the duty of the executive to the non-participating royalty owner. It is believed that the question has not been put squarely before the Mississippi Supreme Court. However, two cases have mentioned this duty. In *Rogers v. Morgan*,[203] the court mentioned the cases recognizing the existence of a duty on the owner of the executive right, but did not find it necessary to decide whether the assumed duty was breached by the executive, since the court held that the suit was filed prematurely.

The court stated:

> The allegation in the original bill that a producing oil well was located within 900 feet of the land here involved and was draining the oil from the lands of the complainant has been considered by this Court, together with the allegation that the holders of the executive right to lease the lands of the royalty owner, complainant, is in the nature of a trust relationship, *and that the holder of the executive right to lease owes the royalty owner the utmost fair dealings, good faith, care and diligence to lease the property for the benefit of all concerned . . . We do not pass upon this question at this time, however* . . . It is therefore obvious the bill was prematurely filed insofar as it seeks to force the executive owners to lease or explore the property. (emphasis added).[204]

It will be noted that the nature of the duty alleged in the *Rogers* case is the same as that favored in Texas. In a 1968 case, *Harris v. Griffith*,[205] concerning the construction of a deed, the Mississippi Supreme Court held that the deed, which expressly reserved to the grantor bonuses and rentals, conveyed only a non-participating royalty, and that the executive right remained in the grantor. Apparently under the impression that they owned a mineral interest including the right to lease, grantee's successors granted a lease providing for an overriding royalty instead of the bonus to which the grantor was entitled under his deed. The court stated that:

> [T]he retention of bonuses and lease rentals under these circumstances justifies the implication of an intent to retain the executive right in the grantor. They are closely and materially

[203] 250 Miss. 9, 164 So. 2d 480 (1964).
[204] *Id.* at 22, 164 So. 2d at 485.
[205] 210 So. 2d 629 (Miss. 1968).

> related to the executive right. The latter may be separated, but this should be done explicitly. The potential difficulties from an opposite approach are illustrated in the instant case. Mesdames Crain and Griffith executed the purported lease on their 1/8 interest to Harris without receiving any bonus, but instead took an overriding royalty. Yet Griffith, clearly entitled under the deed to receive lease bonuses, is deprived of any such benefit under the Harris lease. *This is not consistent with a duty of good faith and fair dealing by the owner of the executive right.* (emphasis added).[206]

IV

Conclusion

While the precise question has not yet arisen in Mississippi concerning the nature of the relationship between the executive and the non-executive interests, it has received considerable attention in other states. It appears to be well recognized that the executive owes some type of duty to the non-executive interests since the latter are prevented from leasing. What the Mississippi court will decide is still unknown, but dicta in two Mississippi cases indicate that this state may follow the policy of Texas in adopting a duty of "utmost fair dealing," which falls between a high fiduciary duty and a low standard of ordinary care and good faith.[207] If so, Mississippi would reject the view adopted by Louisiana that the executive has no implied fiduciary duty toward the non-participating royalty interest and non-executive mineral interest.

The question also remains to be settled in this state whether the executive may lease as well as pool the non-participating interest. In Texas, the executive may lease but not pool; in Louisiana, the executive may pool as well as lease. It is suggested that Mississippi should adopt the view that the executive has the right to pool the non-executive interest and to negotiate for such pooling in the same way as he negotiates other clauses in the lease. Such a policy would inure to the benefit of all parties and would encourage the development of the property which, after all, is the main purpose of investment in royalty and mineral interests. The non-executive interest should be fully protected by the implied covenant of "utmost fair dealing" on the part of the executive and, if there is a breach of such covenant, the non-executive may have his rights enforced by the courts.

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[206] *Id.* at 634.

[207] Harris v. Griffith, 210 So. 2d 629 (Miss. 1968); Rogers v. Morgan, 250 Miss. 9, 164 So. 2d 480 (1964).

LET'S ABOLISH THE "FOUND-DEAD" PRESUMPTION

*Wade H. Lagrone**

Mississippi has adopted many constructions of its Workmen's Compensation Act which have failed to achieve universal acclaim. It is basic to liability under the Act that an injury arise out of and in the course of employment and the mere fact that the employee is on the job doing his usual work at the time of disability or death is insufficient to establish such injury.[1] Nevertheless, many cases have been held compensable even though the basic liability required is not readily apparent. An intentional assault by a fellow employee for reasons unrelated to employment,[2] and Acts of God, whether due to increased risk[3] or not[4] have been held to cause injuries which "arise out of" employment. It is also basic to liability that the injury occur to one who is an employee, yet even here there have been some surprising results which a layman might find difficult to understand.[5] The legislature in 1968 made an effort to define more clearly what constitutes an "independent contractor,"[6] but there is no clear and present answer.

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[1] Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 59 So. 2d 294 (1952).

[2] Mutual Implement & Hardware Co. v. Pittman, 214 Miss. 823, 59 So. 2d 547 (1952).

[3] The increased risk doctrine was embraced by the Mississippi Supreme Court in Jackson v. Bailey, 234 Miss. 697, 107 So. 2d 593 (1958); Pigford Bros. Constr. Co. v. Evans, 225 Miss. 411, 83 So. 2d 622 (1955). The former case involved an employee who was standing in an open field by his truck when killed by lightning. Coverage was extended to the dependents of Evans because he was sitting on a machine six feet off the ground when killed by a tornado.

[4] Wiggins v. Knox Glass, Inc., 219 So. 2d 154 (Miss. 1969).

[5] Brown v. L. A. Penn & Son, 227 So. 2d 470 (Miss. 1969); Brown v. E. L. Bruce Co., 253 Miss. 1, 175 So. 2d 151 (1965); Boyd v. Crosby Lumber Co., 250 Miss. 433, 166 So. 2d 106 (1964).

[6] Miss. Code Ann. § 6998-02 (19) (Supp. 1968).

> "Independent contractor" means any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer, except as to the results of the work, and who has the right to employ and direct the outcome of the workmen independent of the employer, and free from any superior authority in the employer to say how the specified work shall be done, or what the laborers shall do as the work progresses; one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result. *Id.*

How the legislature came to use this specific language might make an interesting story. The language was supposedly lifted from a Tennessee Supreme Court decision. The imprecise use of the word "employer" is obvious. Furthermore, it is clear

Even the question of dependency in death cases has been troublesome. That compensation is payable not to heirs at law and only to "dependents" is another basic concept of workmen's compensation and where there are no dependents, no benefits are payable, except in unusual cases.[7] However, benefits have been paid to natural children without regard to actual dependency,[8] and such children have been held "conclusively presumed" dependent,[9] although the court has modified its position in a case where the natural child was actually adopted by another.[10] Actual and expected contributions determine dependency,[11] and even minor support from the deceased has sometimes been sufficient to establish the right to full benefits,[12] even though the Act contains some reference to partial dependency.[13]

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enough that the legislature intended for the "right to control" concept to be abandoned in favor of "actual control." It is on this basis that an employment relation has been established by the Mississippi Supreme Court in the controversial logging contractor cases cited, *supra* note 5, where there was no question but that absolutely no control was exercised by the would-be employer. The Mississippi Supreme Court felt that the *right* to control was determinative. Although this is by no means an innovative approach to determining a master-servant relationship, the extent to which such "right" exists has been inferred by the court from scantly more than continuity of service for one company and a lack of what the court felt should be a truly independent business. *See* Brown v. L. A. Penn & Son; Brown v. E. L. Bruce Co.; Boyd v. Crosby Lumber Co., *supra* note 5. A hint is found in the Mississippi Manufacturers Association Bulletin of November 12, 1969, as to the economic significance of coverage to logging and lumbering workers in that the 1968 manual rates per $100.00 of payroll for such operations was $19.67. Ship-building, by comparison, carried a rate of $1.46. Furthermore, aside from questions concerning what shall happen to the many "undersirables" now involved in log hauling operations who would be replaced by employers demanding a better class of employee, there are some extremely serious consequences of an overly-liberalized concept of what constitutes an employee. Whatever law is made on this subject in the realm of compensation cases may spread far beyond the boundaries of industrial injuries alone. Already, the law made by Brown v. L. A. Penn & Son; Brown v. E. L. Bruce Co.; Boyd v. Crosby Lumber Co., *supra* note 5, has been applied in negligence cases. *See* Powell v. Masonite Corp., 214 So. 2d 469 (Miss. 1968); Stubbs v. Green Bros. Gravel Co., 206 So. 2d 323 (Miss. 1968). The liability of an employer for Withholding Taxes, Social Security and Unemployment Compensation is very much involved in this question. Should the "Mississippi Rule" be adopted by the Internal Revenue Service and Social Security Administration, the enormous burden on companies doing business with "logging contractors" where cash is paid by the board foot without deduction for Withholding or Social Security taxes staggers the imagination.

[7] The second-injury fund.

[8] Anderson-Tully Co. v. Wilson, 221 Miss. 656, 74 So. 2d 735 (1954).

[9] *Id.* at 665, 74 So. 2d at 738.

[10] Fairchild Constr. Co. v. Owens, 224 So. 2d 571 (Miss. 1969).

[11] Bradshaw v. Rudder, 227 Miss. 143, 85 So. 2d 778 (1956).

[12] Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So. 2d 634 (1951).

[13] MISS. CODE ANN. § 6998-13 (q) (Supp. 1968).

Although there is interest in modifying these constructions so as to limit the payment of benefits and there is also interest in liberalizing the benefits payable,[14] the most overwhelming need for legislative action at the present time is in the field of heart-death cases where employers are being held liable for certain deaths without any proof of causal relationship to employment. In such cases the deaths have been held to arise out of the employment by presumption. This article suggests that causal relationship should not be established by presumption and recommends legislative action to correct this "confounding problem."

The history of presumptions in Mississippi has been characterized by confusion. The general subject has received treatment by several authors.[15] However, only the state of the law applicable to presump-

[14] The Act's benefits may not be adequately meeting desirable objectives at this time. Maximum weekly indemnity has been raised sixty percent in twenty years and maximum recovery has been increased seventy-five percent. *Compare* MISS. CODE ANN. § 6998-07, 09 (1952) *with* MISS. CODE ANN. § 6998-07, 09 (Supp. 1968). Yet, these increases do not match the corresponding increases in wages. Furthermore, since MISS. CODE ANN. § 6998-07, 09 (Supp. 1968) provides for maximum benefits at two-thirds of the weekly wages with a maximum of $40.00, it cannot be ignored that the average weekly industrial wage in Mississippi is now over $90.00. This must mean that only a minority of workers can achieve compensation at the full two-thirds rate. Moreover, Mississippi's position among the states has deteriorated in the past twenty years relative to many benefits. We still have a numerical exemption and a maximum period when many states do not. *See* MISS. CODE ANN. § 6998-03, 09 (Supp. 1968).

These observations take on special significance when it is seen that there are serious attempts being made to do away with state workmen's compensation laws and superimpose some type of federal system.

According to a chart published by the Mississippi Manufacturers Association in December, 1969, Mississippi's ratio of maximum weekly indemnity to average income is 42.7%, which is third from the bottom, compared with ten other southern states. Mississippi has the third lowest maximum benefit.

However, such relative positions do not seem as significant as the numerical exemption. To exclude coverage to any employment in which less than eight operatives are regularly employed is to allow some of the most hazardous employments to occasion injuries for which there is no real remedy. Only one southern state has no numerical exemption. Nevertheless, all but three other states in the Union have a smaller numerical exemption and only one other has as great an exemption. 1A A. LARSON, WORKMEN'S COMPENSATION LAW § 52.10 (1968) [hereinafter cited as LARSON]. The extension of the Act to those who have no coverage seems a more reasonable next step than increasing benefits to those who already have some protection.

[15] 2 J. ALEXANDER, MISSISSIPPI JURY INSTRUCTIONS § 3761, at 206 (1953). C. GIBBES, PRESUMPTIONS AND INFERENCES, 23rd ANNUAL MISSISSIPPI LAW INSTITUTE 197-218 (1968); V. GRIFFITH, OUTLINES OF THE LAW 660-64 (1949) [hereinafter cited as GRIFFITH]; T. HUTTON, SUMMARY STATEMENT OF THE LAW OF EVIDENCE IN MISSISSIPPI 537-710 (2d ed. 1953); T. MCELROY, MISSISSIPPI EVIDENCE § 13, at 21 (1955). The subject has escaped treatment in the *Mississippi Law Journal* except in articles dealing with Mississippi's inimitable Prima Facie Statute, MISS. CODE § 1580 (1930); Carlton, *The*

tions in workmen's compensation death cases will be discussed here.

In *Leake County Cooperative v. Dependents of Barrett*,[16] something of a milestone was reached in the treatment of heart-death cases. The deceased had suffered from a defective heart caused by rheumatic fever as a child. He had, within a month prior to his death, nearly died from a serious heart attack. He was doing nothing at the time of his death but driving an empty truck down an interstate highway. He was seen to pull over and stop. He was found dead within minutes. The sole medical witness for the claimant, a general practitioner from Carthage, testified that the deceased had such a bad heart condition that anything he did could possibly or very likely contribute to his death. Two cardiologists testified that the deceased's death was not related to his work activity. The commission denied the claim, finding on disputed testimony that the deceased's death was unrelated to his employment. The supreme court utilized a "found dead"[17] presumption to reverse the commission, award compensation and remand the case for apportionment. The court attempted to reconcile the various decisions on this subject but could not. The court simply said that it did not believe the cardiologists were reasonable. It was felt that since the "found dead" presumption applied, the only question was whether the defendants rebutted it. Since the sworn testimony of two heart specialists was based upon "possibly inadequate" hypothetical questions that were "neither substantial nor reasonable," the court concluded the presumption had not been rebutted. Commenting on the difficulty of administering justice in heart cases, the court said:

> Heart failures, attacks, and diseases have presented unique and most difficult problems under the Mississippi Workmen's Compensation Act. Just as the rainbow embodies in its spectrum all colors, so have the Workmen's Compensation Commission and this Court utilized all legal strategies in determining the compensability or non-compensability of claims relating to heart maladies. An objective, invariable and just yardstick or criterion of determiners relating to heart cases appears to be im-

Mississippi Prima Facie Statute Relative to Railroad Accidents, 11 MISS. L.J. 416 (1939); Smith, *Mississippi's Odd and Confused Statute*, 2 MISS. L.J. 228 (1929); Venable, *Mississippi's Prima Facie Statute*, 2 MISS. L.J. 384 (1930). The particular subject of presumptions applicable to claims for death arising under the MWCA has been summarized by V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 269 (2d ed. 1967) [hereinafter cited as DUNN].

[16] 226 So. 2d 608 (Miss. 1969).

[17] This presumption has been adequately stated by the court, citing Dunn: The rule is that when it is shown that an employee is found dead at a place where his duties required him to be or where he might properly have been in the performance of his duties during the hours of his work, there is a presumption that his death was the result of an accident arising out of and in the course of the employment. DUNN, *supra* note 15, at 611.

> possible of realization. In our effort to find the pot of gold called justice at the foot of the rainbow thus it is under remarkably similar factual circumstances that the orders of the commission as affirmed or reversed by this Court vary like the rainbow's colors from red to violet. The legislative process affords probably the only solution to this confounding problem, since it is not within the province of the judiciary to legislate.[18]

The same day, *Washington v. Greenville Mfg. and Machine Works*[19] was decided. The deceased was found inside the door of the employer's plant. From testimony concerning his usual routine it appeared he had been in the building approximately ten minutes. The only physician who testified was a heart specialist who not only had been treating the deceased for hypertensive cardiovascular disease for about five years, but also examined him at the hospital, pronouncing him dead. His death was ascribed to "cardiac arrythmia, type undetermined, due to arteriosclerotic heart disease," and in the physician's opinion the death was due to a heart attack totally unrelated to his work.

Our supreme court overturned the decision of the commission and circuit court, saying, again, that the physician's testimony was unreasonable, even though he was an experienced cardiologist who as personal physician to the deceased had treated him for five years and had pronounced him dead at the hospital. The court felt that the physician assumed that the deceased died of a heart attack, and that the work did not cause it. The physician was also considered to have assumed unproven facts in a hypothetical question. In the court's decision, written by Judge Inzer, the physician's opinion concerning the absence of work relationship was a mere "assumption" as was the very diagnosis of death by heart attack itself. However, the court seemed to recant on its characterization of the physician's opinion relating to cause of death as a mere assumption, since it ordered the case back to the commission for apportionment. If the testimony were insufficient as to cause of death, it hardly seems reasonable for it to be sufficient for apportionment purposes. However, the court went on:

> [A]ssuming that the testimony of the doctor is sufficient evidence to support the finding by the Commission that Washington died as a result of a heart attack, there is still the presumption that the heart attack resulting in death was causally related to Washington's work activities.[20]

The court then set forth the burden employers face in overcoming the "found-dead" presumption:

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[18] *Id.* at 613-14.

[19] 223 So. 2d 642 (Miss. 1969).

[20] *Id.* at 646.

> In order to overcome the presumption of causal connection not only must the cause of death be explained but the work activities of the decedent must also be fully developed to show that such activities did not cause or contribute to the heart attack.[21]

These decisions were an almost inevitable development of existing law when they were handed down in September, 1969. Although (as Judge Brady stated in *Barrett*) the incipient recognition of the presumption was *Majure v. William H. Alsup & Associates*,[22] the roots sink deeper into general law. Long before the Workmen's Compensation Act, it was recognized that where there is a showing of a general relationship of master and servant, a rebuttable presumption arises that injuries committed by the servant were within the scope of his employment.[23] In *Majure* the court was dealing only with an employee who drowned at a time when there was no proof as to what he was doing. The only point involved was whether the deceased was in the scope of his employment. It was in other cases that causal connection came to be presumed.[24] If there were any doubts about whether such presumption applied only in "found dead" cases, *Mississippi State University v. Hattaway*[25] should have laid them to rest. The presumption, according to *Hattaway*, applies just as well to an employee who dies without explanation on the job and in full view of other employees. In *Russell v. Sohio Southern Pipe Lines*,[26] it was stated that a requirement that the actual death take place on the job seemed unnecessary, as long as the symptoms occurred while at work. However, in *Rushing v. Water Valley Coca Cola Bottling Co.*[27] and *Franks v. Goyer Co.*[28] such did not appear to be the case. It seemed reasonably clear that in order to rebut the presumption, it had to be shown that deceased suffered from a pre-existing condition, the details of his work, the activities leading up to his death and the actual cause of death.[29] However, additional requirements were mentioned in the Washington case, where a fifth requirement was added: that the work activities be fully developed to show that they *did not* cause the death:

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[21] *Id.* at 647.

[22] 216 Miss. 607, 63 So. 2d 113 (1953).

[23] Eagle Motor Lines, Inc. v. Mitchell, 223 Miss. 398, 78 So. 2d 482 (1955); Merchants Co. v. Tracy, 175 Miss. 49, 166 So. 340 (1936).

[24] *See*, DUNN, *supra* note 15, § 269, at 354.

[25] 191 So. 2d 418 (Miss. 1966).

[26] 236 Miss. 722, 112 So. 2d 357 (1959).

[27] 232 Miss. 338, 98 So. 2d 870 (1957).

[28] 234 Miss. 833, 108 So. 2d 217 (1959).

[29] Union Producing Co. v. Simpson, 251 Miss. 183, 168 So. 2d 808 (1964); Highway Patrol v. Neal's Dependents, 239 Miss. 505, 124 So. 2d 120, *sugg. of error overruled*, 239 Miss. 513, 125 So. 2d 544 (1960).

> In order to overcome the presumption of causal connection not only must the cause of death be explained, but the work activities of the decedent must also be fully developed to show that such activities did not cause or contribute to the heart attack.[30]

Judge Gillespie expressed his opinion on this subject:

> In case after case over a period of many years this Court has extended the application of the workmen's compensation act in heart cases. This writer dissented in a number of those cases, being of the opinion that except where there is some exertion, trauma, or specific emotional episode medically capable of precipitating an attack that there is no substantial causal connection between the attack and the employee's work, and when the progress of the disease happens to culminate in an attack while he is employed the death or disability is not compensable.
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> . . . .
>
> It has been and is now my opinion that the application of the workmen's compensation act in heart cases has been extended beyond the intention of the legislature and beyond the basic purposes of the workmen's compensation act. However, I am bound by the former decisions of this Court and after *Seay* there is little, if any, area left to litigate in heart cases. If the act is to be evenly applied to all cases, it seems to me that all, or at least most, heart attacks by employees must be held to be compensable whether it occurs on the job or while the employee is at rest, as in *Seay*.[31]

Judge Robertson in a dissent criticized the majority opinion chiefly on the ground that the presumption had been adequately rebutted:

> The decedent's own doctor testified positively, unequivocally, and clearly that the sole cause of death was the decedent's long preexisting and progressive heart disease. Yet this Court says we cannot believe this reputable doctor on oath, and that the commission should not have believed him. I pose the question that if we cannot believe a qualified doctor when he testifies clearly, positively and unequivocally on medical matters where he is admittedly an expert, then who can we believe?[32]

The views of Justices Robertson and Gillespie are persuasive, al-

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[30] Washington v. Greenville Mfg. and Machine Works, 223 So. 2d 642, 647 (Miss. 1969).

[31] *Id.* at 648. Judge Gillespie was referring to Mississippi Assn. of Ins. Agents, Inc. v. Seay's Dependents. 218 So. 2d 413 (Miss. 1969), which upheld the commission's finding of a work-related death due to heart attack which took place in the early morning while the deceased was asleep in his hotel room while attending a convention. The death occurred many hours after any possible work activity but it was related to employment by medical testimony which the commission chose to believe. There can hardly be any justification for such a result, either before the commission or supreme court.

[32] *Id.* at 651.

though, to this writer, the problem lies deeper. It is due to a change in concept as to the whole basic nature and purpose of presumptions. A presumption should be grounded upon human experience, evidencing a rational and reasonable relationship between proven fact and presumed fact so that, as Judge Griffith said:

> . . . it becomes permissible to directly prove some collateral or related fact or facts so connected with the main fact that in the light of human experience the existence or nonexistence of the latter may be dependably inferred from the existence or nonexistence of the former.[33]

How reasonable is it to presume a child legitimate if born in wedlock! How reasonable to presume receipt of a letter if mailed! But even such presumptions vanish by testimony to the contrary. In Judge Griffith's words:

> It is at once to be noted, however, that presumptions are not allowed to supply facts which are known to the party who would rely on the presumption and to whom direct evidence is reasonably available; and when the actual facts appear in evidence, the presumption disappears.[34]

The "found dead" or "fall dead" presumption utilized in Mississippi has, since its application to causal relationship, been a troublesome maverick. It is not grounded in human experience and absolutely defies known medical science. The original "scope of employment" presumption applied to "found dead" cases was quite reasonable. It was bottomed on sound general principles recognized in this state and many others. It was quite reasonable to require an employer to show affirmatively if a servant had deviated from the course of his employment. The employer was in the best position to offer proof in this connection. But when it comes to inferring or presuming causal relationship just by virtue of presence on the job at the time of death or the onset of symptoms, there is a painful lack of logic. Who is in a better position to prove the cause of death and its relation to employment than the widow or next of kin? The employer has not been granted any express right of autopsy and frequently many months expire before a claim is made. The rule adopted by our court in these cases constitutes an unreasonable and unnecessary burden on employers and is a radical departure from traditional concepts of burden of proof.[35]

Why make an exception to all the rules in the case of death by heart attack? Mississippi is in a singular position in this connection.

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[33] GRIFFITH, *supra* note 15, at 660.

[34] *Id.* at 661.

[35] Authorities are abundant that the claimant has the burden of proof which never shifts. *See*, DUNN, *supra* note 15, § 268, at 350-52 .

Even states which actually have statutes creating presumptions of compensability in the absence of substantial evidence to the contrary, do not interpret those statutes as our court, by mere construction, has created and applied presumptions in Mississippi. The Florida Supreme Court, in construing its statute, has said:

> We conclude that proof of death alone, even though the death occurred while deceased was in the performance of his employment is insufficient in itself to establish any causal connection between the employment and death. In such cases as this, the body of the deceased is available for an autopsy or for a medical examination. The law requires that at least some evidence be presented by the claimant to establish the cause of death, or that sufficient evidence be introduced to allow a logical inference of a connection between the death and the employment in order to bring such claim within the purview of the Workmen's Compensation Act.[36]

The States of New York and Massachusetts also have statutory presumptions similar to Florida's and interpret them similarly.[37]

Furthermore, in cases where there is evidence that the employee suffered a heart attack but no evidence that the employment contributed to it, a substantial majority of states deny benefits. Such jurisdictions include New Hampshire, South Carolina, New Jersey, Texas, Kentucky, Massachusetts, New York and Georgia.[38] According to Larson most jurisdictions actually apply a presumption *against* compensability:

> The rationale is that such cases are not really unexplained-death cases since the cause of death is known and that cause, being idiopathic, is personal. In this view, when an employee suffers from a potentially fatal preexisting disease, *it is presumed* that death results from natural physiological causes and the burden is placed upon the claimant to supply evidence overcoming this presumption and associating the death with employment.[39] (emphasis added).

Only Mississippi and Missouri seem to utilize presumptions similarly.[40]

Mississippi appears to be applying a presumption of compensability against employers in death cases which they are being denied much chance of rebutting. The court's refusal to believe the testimony of reputable physicians, as in the *Washington* and *Barrett* cases, in support of commission findings denying benefits, is ample notice to employers of the

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[36] Pridgen v. International Cushion Co., 88 So. 2d 286, 289 (Fla. 1956).

[37] MASS. ANN. LAWS ch. 152, § 7A (1965); N.Y. WORKMEN'S COMP. LAW § 21 (McKinney 1965); 1 LARSON, *supra* note 14, § 10.33, at 123.

[38] *See*, 1 LARSON, *supra* note 14, § 10.32, at 113.

[39] 1 LARSON, *supra* note 14, § 10.32, at 113-14.

[40] Duff v. St. Louis Mining & Milling Corp., 245 S.W.2d 472 (Mo. App. 1952), *rev'd*, 363 Mo. 944, 255 S.W.2d 792 (1953).

arduous burden of proof they have been required to assume in cases where employees die on the job. To reverse the burden of proof and thus require a party to prove himself *not* liable in a type situation where almost all other states in the American union impose a presumption *against* liability is an extreme position.

Courts abandon traditional positions for various reasons; however, one cannot help but wonder the occasion for this departure. That it is a radical departure from our ordinary course of business seems obvious. That it is a minority view among the American states is also plain. Then, can it be justified under the "liberal interpretation" doctrine as being in the best interest of society? One need only reflect that with the advent of Social Security, veterans benefits and welfare programs, the decision in questionable cases is not between paying a widow and children compensation or throwing them to the wolves. Under Social Security alone, a death payment of up to $255.00 is allowed, compared to $100.00 under the MWCA. Further, maximum total benefits for a family can reach $434.00 per month, almost three times the benefits under MWCA, for life. Maximum benefits for a worker averaging $400.00 per month is $322.40, more than double the compensation rate. These benefits are only partially, if at all, reduced if the worker receives workmen's compensation benefits.[41] The inequities and foolish results which can occur by the interplay of these two sources of worker benefits is a field too extensive for this article. Almost all workers covered by the MWCA are now covered by Social Security. Those few who are not may secure welfare and non-service connected benefits. In fact, receipts from all sources is possible. There has apparently been no study conducted in Mississippi of the extent to which overlapping benefits from all sources occurs, but it should be quite plain that the economic conditions of the dependents of injured workers is hardly one of overriding social significance, requiring extreme liberalism in the administration and interpretation of the Workmen's Compensation Act. It is an odd paradox that liberal constructions have such a firm place in our law at a time when they are needed the least. It may be that the whole doctrine of liberality in construction of the Act is now *passe*. The fact that our legislature only a short time ago amended the Act so as to require a "fair" instead of "liberal" construction[42] would be consistent with this view, although it does not mean exactly what it says.[43]

Neither can Mississippi's view be justified by medical science. Where a death is shown to have occurred by heart attack, the probabilities are

[41] U. S. DEPT. OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY HANDBOOK (4th ed. 1969).

[42] MISS. CODE ANN. § 6998-01 (Supp. 1968).

[43] L. P. Priester & Sons, Inc. v. Bynum, 244 Miss. 185, 141 So. 2d 246 (1962).

inherently against the attack being causally related to the employment except where it is also shown that there has been some unusual strain which occurs at the time of or immediately prior to the attack. In an article published by the American Bar Association Section on Insurance, Negligence and Compensation Law,[44] proposed Model Rules of Practice published by the American Medical Association and supported by the Council on Community Service and Education of the American Heart Association are found.[45] In this article it is noted that no single strain can damage a healthy heart, that heart disease is unrelated to employment and:

> In the presence of known or unknown heart disease, the occurrence of heart symptoms or signs during working hours (arising in the course of employment) indicates that the heart is involved but it does not necessarily mean that the underlying heart condition has been caused or aggravated by employment (arising out of employment) except when unusual physical or mental exertion, medically determined to be definitely unusual and excessive for the individual occurs at the time of, or immediately after, the stress. This relationship is the only one medically agreed upon as a possible acceptable work-connected incident (unusual stress, strain) considered to "light up" or aggravate or expose preexisting cardiac disease . . . .[46]

Considering the medical nature of heart attacks, Larson's summary of the rule in a "substantial majority" of jurisdictions that when an employee suffers from a potentially fatal preexisting disease, it is presumed that death results from natural physiological causes,[47] seems uncommonly good sense.

The economic effects in Mississippi of unreasonably burdening employers with heart-death cases, requiring them to pay when there is no evidence of any relationship to employment, is difficult to assess. The employers in both *Washington* and *Barrett* hired employees with long standing heart conditions. They are not likely to do so again. Who knows how many persons willing and capable of working with a history of heart trouble are unable or will be unable to obtain work? In a Wisconsin study, it was said:

> A survey of Wisconsin industry showed the harm which can result from too liberal cardiac claim adjudication. About half the employers questioned reported that they avoid hiring new

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[44] Hellmuth & Hellmuth, *Heart Attack and Workmen's Compensation: Model Rules of Practice*, 4 FORUM 113 (1969) [hereinafter cited as Hellmuth].

[45] Council on Community Service and Education of the American Heart Association, *Report of the Committee on the Effect of Strain and Trauma on the Heart and Great Vessels*, 26 CIRCULATION 612-22 (1962).

[46] *Id.* at 122-23.

[47] 1A LARSON, *supra* note 14, at § 38.

> cardiac applicants; 48% of these gave the threat of workmen's compensation costs as the reason . . . .[48]

Employers in Mississippi are not likely to be more lenient in employment practices than their Wisconsin counterparts.

To create a unique presumption, supported neither by reason, human experience, medical science nor the public interest, to place such a burden of rebutting the presumption on another to the extent that he is unlikely to do so, is an abandonment of the virtues of liberality and it is certainly not "fair."

Section 6908-02 (3) of the Mississippi Code should be amended so as to add the following words:

> . . . which injury and death must be shown to arise out of the employment by competent medical evidence and not by presumption. The burden of proof shall be on the claimant to prove the cause of death, a causal connection with the employment and that the death occurred in the course of employment.

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[48] HELLMUTH, *supra* note 44, at 115.

THOUGHTS OF A PLAINTIFF'S LAWYER

*Francis S. Bowling**

The discussions in this article will be academic to the older lawyer and probably should be directed only to the young graduate. It has been said, however, that something may be gained by repeated discussion of academic principles. I expect that many who read this article will disagree with all or part of it. Trial procedure should be discussed frequently and brought up to date in the minds of the trial advocate. If what is said here should stimulate a few lawyers of any age to improve their trial preparation and trial advocacy, it will be well worth the effort.

At the outset, I admit that I am prejudiced as I hope I shall always be. I am prejudiced for the ordinary hard working people who are injured or crippled for life through the many forms of negligence seen and read about every day in this changing world. As our "industrial complex" increases, so does the extent and frequency of the negligent injuring of thousands of people.

I am prejudiced for the young people who lose a parent or parents through the negligence of an incompetent or reckless operator of a motor vehicle. No amount of money recovery can ever pay for the resulting damage.

Also, there are some situations that I am prejudiced against. I am prejudiced against the politician who is elected by the general public, but who, after election, is dictated to by the financial institutions and money interests which generously "made up the campaign deficit" and, of course, expect "nothing in return." These returned favors result in the defendants having the advantage in nearly all court procedures. The thought that plaintiffs have an advantage is just a myth.

I am prejudiced against the few attorneys who pay their dues to the American Bar Association and its sub-sections, attend the meetings of the ethics, study or similar committee, and then piously rush to the office to prepare purjured testimony for the defense the next day. They are few, but it is my duty to warn the young lawyer that if he tries enough cases for the plaintiff, he will encounter such an opponent on rare but certain occasions.

I am prejudiced against a system of justice that allows a trial court or an appellate court to determine that a plaintiff has recovered an ex-

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cessive verdict and is permitted by law to order a remittitur,[1] but is powerless to add to a verdict in the event that the verdict is too low.[2] The inadequate verdict occurs with much more frequency than does the excessive one, and something is wrong with a judicial system that is so discriminatory.

I am prejudiced against those who make the blanket statement that the procedure in the courts of our state is archaic and out of date. I readily admit that there is ample room for improvement in categories such as discovery procedures. I contend, however, that except for a few needed changes, the procedure in Mississippi is simple and effective. It does not need to be completely discarded with complete substitution of the so-called modern reforms. These changes are usually called for on the basis of preventing delays. I know of no court in the State of Mississippi where a litigant is delayed in getting a hearing unless the delay is caused by the laxity of his attorney.

In January, 1969, the Special Committee on Automobile Accident Reparations of the American Bar Association[3] reported to the House of Delegates its findings and recommendations as to changes in court procedures and substantive law in order to meet the assault on our adversary form of jurisprudence. A reading of that report will show that of the first ten recommendations of the Committee, Mississippi already has nine of them in force. The recommendations are:

1. The adoption of comparative negligence;[4]
2. The discarding of charitable immunity;[5]
3. The changing of governmental immunity;
4. Increasing the number of trial judges to eliminate "excessive" court delay;[6]
5. Emphasis upon training for advocacy;
6. The establishment of judicial commissions;[7]
7. Programs of judicial education;
8. Public concern with judicial administration;

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[1] Raynor v. Lindsey, 243 Miss. 824, 138 So. 2d 902 (1962) (trial court); Illinois Cent. R.R. v. Nelson, 245 Miss. 395, 146 So. 2d 69 (1962) (appellate court).

[2] Woodmansee v. Garrett, 247 Miss. 148, 153 So. 2d 812 (1963) (trial court).

[3] SPECIAL COMM. ON AUTOMOBILE ACCIDENT REPARATIONS, AM. BAR ASS'N RPT. (1969).

[4] MISS. CODE ANN. § 1454 (1956).

[5] New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962).

[6] MISS. CODE ANN. §§ 1216.1, 1220.1, 1224.1 (Supp. 1968) (chancery courts); *Id.* §§ 1395.1, 1396.1, 1398.1 (circuit courts).

[7] MISS. GEN. LAWS ch. 312 (1968).

9. The establishment of court administrators;
10. The reduction of a unanimous jury verdict in civil cases to a nine juror verdict.[8]

Out of these first ten recommendations, Mississippi does not have judicial administrators. The state also adheres to a certain amount of government immunity, but most state agencies have taken care of this situation at the present time by liability insurance. For example, highway patrol vehicles, highway department vehicles and most other state vehicles are covered and claims are permitted to the extent of the coverage. I believe that most attorneys agree that all state immunity in our modern time should be abolished.

Preparing Ourselves

We come now to the discussions of preparing and trying cases for the plaintiff. I have found over the years that the attorney who wishes to specialize in a plaintiffs' practice needs a lot of self preparation. He will find himself berated, criticized and sometimes called uncomplimentary names, not the least of which is "darn damage suit lawyer." He will be subjected to much argument and literature from the insurance industry, whose stock continues to climb, regarding the fact that adequate verdicts are ruining the country and the judicial system.

The idea that plaintiffs receive more sympathy at the hands of juries than do defendants is a myth. The defendants are too well organized to allow such a situation to exist. They know, far in advance of the occurrence leading to the case, that they will become defendants on frequent occasions. They control the press, television, and the other mediums of publicity. As recently stated in an editorial that appeared in the Journal of the Alabama Plaintiff's Lawyers Association,[9] nobody is in the business of getting killed or injured, but industries and insurance companies are in such a business that by statistical experience they know that they or their insureds are going to kill or injure a certain number of people annually. They are organized to take care of the problem. They have claim departments, lawyers on retainers, company doctors, adjusters and investigators. What is more significant is that they have public relations departments to create a climate of opinion to the effect that plaintiffs already get more than they deserve. Lawyers with any appreciable experience know that the defendants generally have an advantage in litigation.

The public is bombarded today with so much confusing information from the defendant's side of tort litigation, that it is hard to know

[8] Miss. Const. art. 3, § 31; Miss. Code Ann. § 1801 (1956).
[9] Journal of the Alabama Plaintiff's Lawyers Association.

what is true and what is untrue. It is well known that the insurance industry has bookkeeping and accounting procedures from which no layman can get a true financial picture. Only the company's actuary is able to interpret the financial statement. Recently, during the "rate increase," the defendants' propaganda experts did an excellent job of relaying to the public that "we are all going broke" because of Hurricane Camille. A rate increase was granted promptly. In reading an impartial analysis from the largest independent brokerage firm in the country, Merrill Lynch, Pierce, Fenner and Smith, Inc., we find in its year-end advice on insurance stock as affected by Hurricane Camille, the following:

> Hurricane Camille which caused about $225 million in estimated damages to insured property (second only to the $715 million of insured damages from Hurricane Betsy in 1965), abruptly broke the improved underwriting trends of many fire-casualty insurance companies in 1969.
>
> Although estimated costs of the hurricane to individual companies varied sharply, nearly all major firms in the industry shared in those losses. In our opinion, however, the market reacted to the news of the hurricane with surprising equanimity; and the uptrend in prices for many fire-casualty stocks was interrupted only temporarily. Despite cost of the hurricane damage, we expect a number of companies to report increases in statutory operating earnings for 1969 as the result primarily of gains of 10% or more in investment income.[10]

It is noted that the loss in Hurricane Betsy in 1965 was approximately $3\frac{1}{2}$ times the loss in 1969. Any investigation would reveal that the insurance industry, after Hurricane Betsy, has grown by leaps and bounds.

In a recent issue of the Wall Street Journal,[11] there was a discussion of the 1969 profit situation of one of the six companies that incurred the largest loss from Hurricane Camille. Without any rate increase, its net profit was the same in 1969 as in 1968 when the net profit increase was 26%.[12] The readily given rate increase resulted in an even greater profit.

One of the biggest problems, therefore, is for the plaintiff's lawyer not to be subdued by the highly organized propaganda of the defendants. To be so subdued will enlarge the myth that the poor defendants are at a disadvantage with an injured plaintiff. Nothing could be further from the truth.

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[10] MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., SECURITY & INDUSTRY SURVEY—A GUIDE FOR INVESTORS 26 (1970).

[11] The Wall Street Journal, Jan. 14, 1970, at 6, col. 2 (Eastern ed.).

[12] *Id.*

How Is a Plaintiff's Practice Established?

It is elemental that the attorney who represents the plaintiff or the defendant in tort actions should make an extra effort to keep abreast of the rapidly changing developments in this phase of the law. Space will not permit a discussion of these changes, but it is a simple matter to keep up with them through publications on the subject. Probably the best is the monthly "News Letter" published by the American Trial Lawyers Association. An attorney does not have to become a member to subscribe to this publication and the monthly magazine called "Trial." These two publications alone are sufficient to keep the average trial lawyer current with the latest decisions and changes in all phases of tort law.

It is certainly wise for all attorneys who even infrequently try tort cases to have at least one set of the many works on "Trial Procedures"[13] in his library and at least one of the many works on medical-legal problems.[14]

Moveover, I suggest that our law schools are not placing enough emphasis on trial advocacy. It appears that the majority of young men graduating express no desire to enter the trial field. A reading of national publications indicates that this is a national problem. This may be because the lawyer feels insecure and sometimes inadequate to meet a hard fight in the courtroom. If nothing else is accomplished in this article, I hope that we can convince the young lawyer that he should enter the trial field if he has any talent or inclination to do so. No moment in the practice of law is more rewarding than the successful culmination of a trial on behalf of a person who has been wronged. I am not speaking of monetary reward. Unfortunately, there are many injured persons who see a hope for the future only after the successful termination of their "day in court." I hasten to say to the young lawyer that not every trial will result in his idea of justice being done. On occasions he will feel like shedding tears over the results. This, however, should serve only to increase his desire to try more cases and do a better job. I, therefore, earnestly urge the young lawyer to consider the trial field.

A trial practice is established primarily by hard work, which includes the determination to get in the courtroom and try cases. The defense categorizes the opposition in different ways. They consider some attorneys as "settling" attorneys. This, of course, is fine provided the attorney has first established his reputation as a trial attorney.

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[13] *E.g.*, M. Belli, Modern Trials (1954).

[14] *E.g.*, C. Frankel, J. Holloway, P. McMaster & K. Redden, Lawyer's Medical Cyclopedia (1959).

The young lawyer obviously will ask the question: "How will I get business if I specialize in plaintiff's trial practice?" The first answer is set out in the paragraph above—by working hard and trying cases. The news will get around. At the same time we have to realize that there is a double standard in the law profession as to the ethical means by which the plaintiff's and defendant's lawyer may secure clients. For instance, not long ago a prominent defense firm was seen at the country club with all the principle members around the table with the recently appointed superintendent of claims of a large insurance company at the head of the table. If, on the same night, a plaintiff's lawyer walked into the same country club dining room with a man on crutches, he promptly would be investigated and subject to ridicule and possible disbarment if he did not already have a signed contract in his pocket.

The basic reasons, of course, why an injured person contacts a particular attorney is either because that person already knows of a trial attorney who specializes in personal injury cases or because the injured person's friends or relatives recommend an attorney to him.

Initial Contacts with Client

After the plaintiff's attorney is contacted by a prospective client, we recommend that the initial interview be in the attorney's office if possible. Sometimes, however, the prospective client is in the hospital and the attorney is called there. There certainly is nothing wrong or unethical in the attorney seeing the client initially at the hospital, provided, of course, the attorney is sent for by the prospective client. Probably the injured person did not send for the insurance adjuster who more than likely has already attempted to visit him. Further, the insurance adjuster was probably a member of the Bar but working full time for his company. Therefore, the agent was subject to a "double standard" of ethics.

Regardless of where the initial contact with the client occurs, we recommend certain lines of communication. Of course, the first should be a signed contract or assignment.

Since an immediate investigation of the cause of the client's trouble is essential, complete notes on the facts of the matter should be made as soon as possible. Some experienced attorneys have prepared forms on which to transcribe this information. We do not recommend such forms as we have found that every case is different and the forms will only be confusing. Complete notes, however, should be made at the time. Unfortunately, the memories of attorneys are just as fallible as those of laymen.

It is important to remember that the matter you are discussing

with the client may be repetitious to the attorney; but at this point it is probably the most important thing in his life. It is, therefore, recommended that the attorney keep in mind that the client is presenting his case most favorably and the attorney should insure that he secures information that is unfavorable as well as favorable.

It is important to learn as soon as possible whether or not the injured client has had prior injuries; and, if so, the attorney should obtain detailed facts thereon. Many times the layman will not divulge such information because he has the idea that "no one knows" or that the prior accident has no relation to the present claim. The client should be advised immediately that the insurance companies have a central index from which information is supplied regarding all claims. One of the first things done by the claim department involved is to check this index and secure the complete records of the client's prior claims.

Of course, written authorization should be secured immediately from the clients for the purpose of securing all medical and hospital records.

We further recommend that the attorney and the client have an initial agreement as to the future course of handling the claim. One of his first questions usually is "How much is my claim worth?" In the first place, no lawyer can decide the value of a claim until his file is complete. In the second place, if the attorney makes a guess and advises the new client as to the value of his claim and that amount is not secured, it invariably results in an unhappy client. It is necessary, of course, to advise the client that no settlement will be made without first securing his permission. In the meantime, the client should be warned as to the things he will hear during the course of his pending claim. His neighbors will tell him that a stranger was there inquiring about the client, what he has been doing around the house and investigating his activities fully. He should be told that in the event of a trial on the claim he, in all probability, will be confronted with motion pictures of his activities prior to the trial.

I certainly do not want to leave the impression that this suggested advice should imply to the client that he should conduct himself in an improper manner or act other than in accordance with his physician's instructions. This should be made plain, and the client should be made to understand from the outset that an attempt on his part to "stretch" his claim will usually be detrimental to him.

The client and the attorney should be in contact frequently until the conclusion of the case. Busy trial lawyers often forget that although he has many cases pending, the client has only one. We recommend that periodically the attorney go through his files and call the client

for a conversation about his case, whether or not the conversation is needed at that time. A happy client is the best client.

There is a difference of opinion as to whether or not the client should be furnished copies of the instruments filed in the court. I personally do not recommend such a practice but, on the other hand, I would recommend an informal explanation to the client, unless copies are specifically requested. The ordinary layman does not understand legal language and frequently misinterprets what he reads in legal documents. Above all, when the attorney is called by the client, whether at the office or at home, he should take time to discuss any phase of the matter that is the subject of the call.

Procedure After Contract Is Secured

The first thing to be done after being employed, is to notify the defendant and his insurer immediately. We will discuss in more detail the relationship between the plaintiff's attorney and the defendant, but it should be noted here that a friendly letter to the defendant, particularly an individual, will begin paying dividends as the claim develops.

A case for the plaintiff, just as a case for the defendant, cannot be brought to a proper conclusion unless it is promptly, properly and thoroughly investigated. This is one of the several advantages the defendant's representative has over the plaintiff's attorney. In practically all claims, the case already has been thoroughly investigated by the insurer's adjuster before the plaintiff employs his attorney. This is more reason for the plaintiff's attorney to begin his investigation immediately. We realize that often it is necessary for the plaintiff's attorney to employ independent investigators; however, it is strongly recommended that the attorney who is to try the case make first contact with the witnesses personally. We have found that this pays dividends as the trial attorney immediately becomes acquainted with the witnesses, all of whom have different personalities. During the course of investigating the case, preparing for trial and setting the case on the docket, the plaintiff's attorney will have occasion to see the witnesses several times. Invariably, the witness will be more friendly, relaxed and impressive in your case if he has been in contact with the trial attorney personally rather than being put on the stand "cold," having talked only to an investigator or the trial attorney immediately prior to his testimony. This, as most everything else in this article, may appear academic to the older trial lawyer; however, we have found that it is things of this nature that lead to successful conclusions of cases.

Prompt investigation often reveals evidence that would not be available later but which may be retained by photographs; for instance, skid

marks and other evidence at the scene when the case involves motor vehicles. Many times there is evidence other than skid marks, photographs of which will later win your case. A recent case was won by the plaintiff mainly on photographic evidence of battery acid on the highway in a head-on collision between two trucks.[15] Frequently there are marks on adjacent highway signs, utility poles, etc., photographs of which will be invaluable when trial time arrives.

Often we find that a witness is hostile. We have found it advantageous to talk to him by telephone and record his hostility for cross-examination at the trial. Almost invariably you will have an opportunity to use part of the recorded statement to adversely affect that witness before the jury.

At the risk of being repetitious, we cannot, in an article of this nature, stress sufficiently the importance of a prompt and thorough investigation of the case for the plaintiff. This is more important than the actual trial.

A mistaken idea that we frequently hear is that the plaintiff's attorney should not contact the adverse party. Nothing could be more erroneous. Of course, we are speaking of any period of time prior to the filing of the case. Although the adverse party cannot be contacted after the case is filed, in our opinion the plaintiff's attorney is derelict in his duty if he does not contact the adverse party as soon as possible after being employed. Many times you will find that the insurance adjuster has instructed the adverse party not to talk to the plaintiff's attorney. Even this simple circumstance usually will benefit the plaintiff later at the trial. The reason is that it is the duty of the plaintiff's attorney to ascertain all facts known by all persons surrounding the incident in question. In addition to securing the facts as claimed by the adverse party, if he is approached in the correct manner, it will be found that he appreciates the attorney's contact. The attorney's acquaintance with him, if handled in a friendly, courteous and ethical manner, many times helps both in the settlement and trial stages of the claim.

After the employment contract is consummated and the medical authorizations are executed by the client, these authorizations should be forwarded to the physicians along with a courteous and friendly letter of transmittal, in which periodic medical reports are requested. Unfortunately, many physicians do not know how to write a report that gives the information required by the attorney, either in negotiating settlements or in preparing for trial. The letter of transmittal should ask for narrative detailed reports on the claimant's injuries and disabilities with an explanation as to why they are necessary. The letter should

[15] Coleman v. Teague, 228 So. 2d 869 (Miss. 1969).

always include a request to the physician to attach a statement for his services. If a statement is received from the doctor for the medical reports, it is extremely important to pay the statement promptly. We have seen many unfortunate situations arise between the physician, the lawyer, and the client regarding the physician's statement. Just as in the case of any witness, an unsatisfied and hostile physician will lose your case or greatly lessen its damage potential. We have found that all physicians have different ideas about what the relationship should be between himself and the plaintiff's attorney. This relationship should be clarified from the outset and the plaintiff's attorney, even if he has to "bite his lip," should make it a point to keep the physician happy. It pays dividends to establish a reputation with the medical profession that you will make sure that their bills are paid promptly. After settlement, a nice letter of transmittal to the doctor with his check will establish good relations in future cases. We cannot emphasize too strongly that good relations between the plaintiff's attorney and the medical profession in his community are essential to a successful plaintiff's practice. The same advice holds true with the administrative officers of the hospitals.

Settlement Negotiations

This is a subject that has many variables, most of which can only be resolved by experience. Insurance companies, like individuals, are all different, and the settlement policies are all different. Some like to sit across the desk in a frank discussion of the issues and honestly try to arrive at a true settlement value. Others like to negotiate and adopt a tough policy even to the day of the trial. Our advice to the young attorney is that unless he has had experience with the particular company or adjuster, the negotiations should be formal and statements of the adjuster should be taken with suspicion. After all, he is hired to work for the best interests of his company.

Regarding the giving of medical reports to the adjuster, we favor this procedure in most cases. Of course, there are some situations where the physician has written a report in such a manner that it should not be given to the company. It must be kept in mind, however, that it is necessary for the company to have sufficient information to evaluate the claim for settlement purposes. We, therefore, adopt the policy of a liberal exchange of medical information unless, as stated above, it is harmful.

The biggest exposure adverse to the plaintiff is the use of the medical reports by defense counsel in cross-examining the physician if the case is not settled. An astute defense attorney always can pick out a phrase or two from the report which tends to impede the plaintiff's side of the case in the minds of the jury. This should always be anticipated by the

plaintiff's attorney in preparing for trial and in conferring with the physician in pre-trial preparation.

Some rules have no exceptions. One is that neither the insurance adjuster nor the defense attorney should be given permission to secure medical reports. They should always come through the plaintiff's attorney. Many times the plaintiff's attorney will find, after being retained, that the client has previously given the adjuster written permission to secure reports. This permission should be revoked immediately in the letter the plaintiff's attorney writes in transmitting his medical authorization.

File Suit

Not long ago we heard a trial judge make the sage statement that "there is no log like the lick-log." He meant, of course, that the quicker the case is set for trial, the quicker a disposition will be made. Fortunately, we in Mississippi, do not encounter excessive trial delays. If a trial is delayed, it usually is the fault of the plaintiff's attorney. A plaintiff's case cannot just take its course. It has to be pushed.

Frequently the plaintiff's attorney has the difficult decision of whether to file the suit in state or federal court. This decision should be made after a careful consideration of the makeup of the federal jury as compared with the state court jury in his local county. Of course, the requirement of a unanimous jury verdict in the federal court[16] is an important consideration. It is necessary for each lawyer, carefully and individually, to evaluate this question. If it is a case of sole federal jurisdiction, we usually file it in state court and let the defendant make the choice for removal.[17] In this situation, however, the limited time to request a jury trial after removal[18] should be kept in mind.

Frequently the plaintiff's attorney has a choice of filing suit against more than one defendant.[19] Mistakes are made in this choice. Frequently, the case against one defendant is strong and the case against the other is weak. Usually the weak case tends to detract from the strong one. There are several other questions that arise, however, which sometimes make the joining of the weaker defendant a necessity. This is mainly in the insurance coverage situation. Again, no two cases are alike on this point, and each has to be evaluated separately.

One of the principal points to keep in mind in joining multiple

[16] Gibson v. Bellingham & N. Ry., 213 F. 488 (W.D. Wash. 1914).

[17] 28 U.S.C. § 1441 (1964).

[18] Fed. R. Civ. P. 81 (c).

[19] Westerfield v. Shell Petroleum Corp., 161 Miss. 833, 138 So. 561 (1932); Fed. R. Civ. P. 19.

defendants is that if their interests conflict, each will get peremptory challenges.[20] We find, however, that although their interests are conflicting, they usually co-operate in picking a jury. This frequently is hazardous to the plaintiff and results in a "defendant's" jury.

On occasions when a vehicle is being operated by an insolvent employee, we have found it advantageous to sue only the employee. Often the owner of the motor vehicle is a prominent citizen of the county in which event it would be difficult to pick a jury. All motor vehicle liability insurance policies have an "omnibus clause" which protects the permissive driver. A judgment within the policy limits would be as good against the driver as against the owner. Moreover, the average juror would use his reasoning power and conclude that there was ample insurance, otherwise the owner would be joined as a defendant. The juror would know that the prominent citizen had not been injured.

We recommend that at the time the suit is filed a friendly and courteous letter be written to the defendant, explaining to him why it is necessary to file the suit. The insurance companies do not like this practice. It is not unethical, however, and it is always wise to keep the defendant happy. An explanation as to why it is necessary to sue him rather than the insurance company and an assurance of your personal concern for him often makes a material difference in the atmosphere of the trial.

We would not undertake to advise the older lawyer as to the type of allegations he should place in his declaration or complaint. To the younger lawyer, however, we would recommend a short, concise statement of the case. Small details such as the time of day, the exact length of skid marks, statements made at the scene, or any other evidence that may be introduced at the trial without being set out in the declaration, should never be placed in the declaration. This only serves to educate the defense.

Another subject which should be directed only to the younger lawyer is the amount of damages requested in the declaration or complaint. We recommend never asking for what would approach an unreasonable figure. The jury will appreciate a realistic evaluation of the claim by the plaintiff's attorney and invariably will resent the requesting of an unreasonable amount.

Trial Preparation

As we have stated before, there is room for improvement in our state court discovery procedures; however, the plaintiff's attorney should

[20] Miss. Code Ann. § 1525 (1956), *construed in* Acree v. Collins, 239 Miss. 583, 124 So. 2d 118 (1960).

take full advantage of all those procedures which exist and which usually are sufficient. He should take full advantage of filing interrogatories[21] and full advantage of motions to produce relevant documents.[22]

One of the first considerations, both in investigating and preparing for trial, is the use of non-medical expert witnesses.

In almost all cases other than simple motor vehicle accidents where witnesses are available, expert testimony should be considered. Space will not permit a discussion of all such instances. The principal area now, of course, is the expanding area of products liability including electrical burns, liquified and natural gas explosions and all types of defective machinery. We cannot impress too strongly on both the younger and older lawyer the necessity of keeping up with the changing trends and recently decided cases.[23]

There are many types of experts available to both plaintiff and defendant, and there are many sources for plaintiffs' attorneys to secure information on these experts and employ one in almost any field. One outstanding authority in this field is Harry Philo of the Detroit Bar who devotes a large part of his time to publications regarding expert testimony and maintaining contact with such witnesses. He is co-author of the Lawyer's Desk Reference[24] which every trial lawyer should have.

One of the expanding fields of expert testimony is economic specialists on the monetary value of injury, disability and loss because of death. There are several professional firms which are organized to render this service.

The Mississippi Supreme Court has apparently not expressly joined the majority of jurisdictions in holding that safety standards, safety codes and other such publications may be introduced during the testimony of an expert in the safety field. Of course, it is highly desirable to introduce such publications during the testimony of an expert witness on the subject. Such a code of standards is not introduced as substantive law, as proof of regulations, or as absolute standards having the force of law or of scientific truth. They are introduced only in connection with expert testimony which identifies them as illustrative evidence of safety practices or rules generally prevailing in the industry; and, such evidence provides support for the opinion of the expert witness.[25] We, of course,

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[21] Miss. Code Ann. § 1712 (1956).

[22] Miss. Code Ann. § 1659 (1956).

[23] *E.g.*, Ford Motor Co. v. Dees, 223 So. 2d 638 (Miss. 1969); Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968).

[24] D. Robb, H. Philo & R. Goodman, Lawyers Desk Reference (1968).

[25] Boston & Main R.R. v. Talbut, 360 F.2d 286 (1st. Cir. 1966); Clark v. Zurich Truck Lines, 344 S.W.2d 304 (Mo. Ct. App. 1961); McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116 (1964); Sage v. Northern Pac. R.R., 62 Wash. 2d 6, 380 P.2d 856 (1963).

anticipate that the Mississippi Supreme Court will clarify this rule of evidence when the question is presented in a proper case.

In many automobile cases, involving either collisions or products liability, we have found that an ordinary mechanic with sufficient training and years of experience makes an adequate witness. He might also make a better impression on the jury than a hired expert from another section of the country.

Most commonly the expert with whom we deal is, of course, the physician. As discussed above, it is essential to cultivate the medical profession's respect for you. As soon as the trial date has been set we recommend that the physician be written immediately so that his records may be clear and so that he may inform you if appearance on that date is impossible. At the same time an appointment should be made to see him in a personal conference in his office to go over the testimony briefly. Even though the average physician appears to have nerves of steel, we find that many of them are extremely nervous when the time comes to sit in the witness chair. At this conference the physician should be reassured of the payment of his fee for court testimony.

May we call the younger lawyer's attention to a small matter, emphasizing, however, that small matters and small things often mean the difference in winning or losing a case. We make it a practice not to issue a subpoena to a physician but to handle his court appearance strictly on a personal basis. For some reason most physicians resent being served a subpoena by a deputy sheriff. We respect this feeling and handle the matter as stated above.

We realize that many older lawyers invariably introduce hospital records. We agree that on some occasions their introduction is proper but hasten to say that frequently they should not be introduced. Certainly they should be analyzed carefully by the plaintiff's attorney. In the first place, hospitals these days always have a lot to say on the first page of the records about hospitalization insurance and other insurance benefits to which the patient probably is entitled. This, of course, diminishes the claim in the minds of the jury. In the second place, often there is some entry made in the hospital record, either by an irate nurse or an upset doctor, which casts doubt upon the sincerity of the client and the extent of his injury. An astute defense attorney always examines the hospital records closely prior to argument and can usually find an entry detrimental to the plaintiff about which he can create doubt in his final argument.

For many years the argument has gone back and forth as to whether or not plaintiffs' attorneys should use charts showing per diem compensation for pain in presenting his case. We have never and still do

not recommend such use. We have found it more convincing and more appreciated by the jury to use lump sum figures; but, of course, in the argument the jury is reminded of the minute by minute and day by day pain suffered by plaintiff.

In the vast majority of motor vehicle collision litigation we recommend a scale drawing by a registered civil engineer of the scene of the collision. If appropriate, there should be a separate scale showing the elevations of the roadway at the scene. Needless to say, large photographs and sometimes aerial photographs are essential.

Other than the preparation of technical evidence, only a part of which has been dealt with under this heading, the most important part of preparation for trial is the preparation of the ordinary witness. It is academic, and no trial lawyer will dispute the absolute requirement that a witness should never be put on the stand without going over his testimony fully with him. To do otherwise is the surest way to lose the case.

We recommend that all of the principal witnesses should be assembled in a pre-trial conference, if possible. It is usually found that a discussion of the facts by one witness will refresh the memory of another witness. Also, this is a good time to ascertain the presence of contradictions between witnesses. Another sure way to lose the case is for the plaintiff to put on contradictory witnesses. One straightforward, direct and impressive witness is worth more than a half dozen indefinite and contradictory witnesses.

The witnesses should be reminded that the attorney for the plaintiff would be derelict in his duty if he did not go over the witnesses' testimony prior to the trial. Therefore, the witnesses should be cautioned to admit that there was a conference when he invariably is asked by the defense attorney with whom he has discussed the case. The witness should be admonished to admit readily that he has discussed it with the plaintiff's attorney.

The witnesses should be fully advised as to the trial procedure and activities from the time he is called from the witness room. He should be reminded that opposing counsel will attempt to make him angry and that he should keep his temper, trying not to engage in an argument with the opposing attorney.

The attention of the witnesses should be called to the fact that they cannot mention whether insurance is involved in the defense of the case, unless such fact is an appropriate answer to a question propounded by the defense attorney. He should be fully advised as to our archaic procedure on this point.[26]

[26] Scott County Co-op. v. Brown, 187 So. 2d 321 (Miss. 1966).

Of course, it is elementary that all models, diagrams, pictures, etc., should be shown to all witnesses, and they should be fully familiarized therewith.

After preparation of the testimony of the witnesses, the plaintiff's attorney should spend much time in preparing his client. There are several things that the client should be told. He should be reminded that he will be in a "glass cage" during the entire trial and that some juror will be looking at him from the time he walks into the courthouse until he leaves after adjournment. He should be reminded that trying a lawsuit is similar to any other "selling job"; it is up to him to sell himself to the jury. He should be told in definite and positive terms that plaintiffs who make bad impressions do not win cases.

The plaintiff's attorney should discuss with the client details such as the clothing he will wear to the trial, including accessories such as jewelry. A jury is not inclined to award much money, however justifiable, to a person who is flashing a large diamond ring on the hand next to the jury box. The client should be cautioned regarding small things such as giggling in the courtroom; and, female clients should be cautioned against smoking in the courtroom. Jurors are composed of many varying types of people. Eleven of them may think it perfectly all right for a woman to smoke. The twelfth might think Satan is waiting for such a female. It should be emphasized that juries often decide cases on "little things."

We recommend that the witness subpoena docket[27] be checked periodically prior to the day of the trial and certainly the day before. If witnesses have been subpoenaed by the defendant and the plaintiff's attorney has not contacted these witnesses, then he is derelict in his duty if he does not attempt to obtain some information on these witnesses. If these strange witnesses are not available to contact in person, they should at least be called by telephone. Many times they will make the statement that they are "on the other side" or similar words. A reminder of these statements on cross-examination the next day usually helps your case with the jury.

The Jury and Voir Dire

In most districts of our state the weekly jury list is available prior to the jury's week of service. The time to find out what type of jury you have is before the day of the trial and not on voire dire. Every reader will understand that this in no way implies contact, either direct or indirect, with the juror or any member of his family. It is essential, however, that something be known about the jurymen prior to their being

[27] Miss. Code Ann. § 1421 (1956).

placed in the jury box. This can only be done by investigation of registration records, city directories, and other public information. Information should be secured about each juror regarding his residence, place and type of work, age, church affiliation, family background, hobbies, prior jury or litigation experience, and any other information that would show the characteristics of that particular juror. We believe strongly in selecting jurors by types rather than by individuals.

Inquiry should be made as to whether the prospective juror is personable, fair-minded, and sympathetic or whether he is hard headed, miserly, and difficult to get along with. Above all, it should be ascertained which of the prospective jurors would be leaders and which would be just followers.

The names and other information secured about the individual jurors should be carefully studied prior to the date of the trial. As a practical matter, you will impress the juror when you are able to call his name on voir dire examination without referring to your notes. The plaintiff attorney's purpose at that point is to get the juror on his side.

After making a study of the prospective jurors, the panel should be analyzed in regard to what type of jurors the attorney wants for that particular case. The case itself usually determines the type of juror needed. For instance, do you want young or old persons, rich or poor persons, workers or executives. Naturally, if your client is a young beautiful female, young males probably would be more sympathetic. If your client is an elderly person who has received a "whiplash" injury to his cervical spine, we certainly recommend older jurors. It is hard for a young, healthy, robust man, who has never had a real pain, to place any appreciable value on such an injury.

In our experience we have found that there are certain types of persons who seldom make good jurors for the plaintiff. Without being unduly critical, it would seem appropriate to discuss such persons. We refer mainly to those persons who spend the major part of their time with "details," such as C.P.A.'s, geologists, advertising executives, etc. Above all, steer clear of the "young executive on the way up" employed by a large corporation. They have been indoctrinated to be against damage suits. We have found, however, that the average so-called "white collar" worker for a large corporation, usually makes a fair juror for the plaintiff or defendant.

On occasion, we have observed a young or inexperienced attorney make a serious mistake in his voir dire examination of the jury by an improper examination of a prospective juror he wishes to challenge for cause. If a juror who appears prejudiced or is a possible challenge for cause is badgered by the plaintiff's attorney or the defendant's attorney,

the other jurors invariably resent such action. They each will put themselves in the place of the juror being harassed.

The plaintiff's attorney, who first appears before the jury, should realize that the majority of the jurors are in the jury box for the first time. They do not know anything about court procedure and are nervous and apprehensive. Each trial judge has his own procedure in addressing the jury prior to voir dire examination. We recommend that the plaintiff's attorney first explain to the jury the procedural reason for his asking the jurors questions. He should explain to them that he is doing so under the court rules which are promulgated for the purpose of securing a completely fair and impartial jury. He should make it plain to them that the questions are not being asked to pry into the juror's personal business or embarrass anyone. This should be the theme throughout the voir dire examination.

The answers and expressions of a juror during voir dire examination are invaluable to the attorney who knows anything about human nature. Usually, you can look a person in the eye while talking to him and determine to a great extent, that person's personality. His eyes will give you a clue as to whether or not he is callous or whether he is a sympathetic type of individual. In most districts in the state, the court adopts the "striking" rule of selecting the juror, and it is done in chambers after all sides complete voir dire examinations. The plaintiff's attorney certainly should pay extremely close attention while the defendant's attorney is conducting his voir dire. Often he can read in the face of the prospective juror the answer as to whether or not he wishes to challenge him peremptorily.

If there is a weak point in your case, such as drinking intoxicants or contributory negligence, it certainly is advisable to meet this head-on during the voir dire examination. In such an event, and in all other cases, each juror should be impressed with the fact that under his oath he will follow the written instructions of the court. He should be reminded of this in the plaintiff's closing argument at which time, frequently, the juror's mind is changed. If the matter of drinking and contributory negligence and other such matters have been developed during the trial, he as a layman, will have placed much emphasis on such facts. Reminding him of his oath at the beginning of the trial usually will cause the fair-minded juror to bring in the correct verdict.

There are two subjects that we recommend the plaintiff's attorney avoid during the voir dire examination. These are religion and politics.

When a death case is being tried, many persons are basically opposed to granting damages to the survivor unless there are some children involved. It is, therefore, recommended that the jurors be asked ques-

tions to ascertain whether or not such a situation exists. Never ask a juror if he is "prejudiced." It is usually advisable to state to the panel that prior experience has shown that some people, because of background or experience, are conscientiously and basically opposed to granting damages in such cases. One should state that he wishes to inquire as to whether or not any juror on the panel has such a feeling. As stated above, never ask a juror if he is "prejudiced." The question itself will alienate him in the case.

Even though the preliminary investigation and voir dire examination of the jury are conducted in the best possible manner, the plaintiff's attorney will, on occasion, find that he just does not have a fair-minded jury for the plaintiff's case. After the twelve persons are selected, a complete analysis should be made. This, of course, has to be done hurriedly and sometimes is a guess. The plaintiff, under our law, starts out with the burden of proving his case by a "preponderance of the evidence."[28] To offset this burden, the plaintiff has the right to take a non-suit at anytime prior to the retirement of the jury.[29] Although the trial courts look with disfavor on such procedure, we recommend that if your analysis of the jury is doubtful to any appreciable extent or is definitely bad, a non-suit should be taken with the hope that a better panel will be drawn when the case is reset. The case will only be tried once, and if it is worth trying at all, it is worth trying properly before a fair jury.

Opening Statement

Unfortunately, some trial courts do not encourage opening statements. The plaintiff's attorney should always make a clear, concise opening statement. Human nature reveals that the first impression implanted in the human mind is hard to replace. The opening statement should be prepared and should be made in a simple and concise manner. At the conclusion of the opening statement, the jury should know exactly what the case is. Caution should be exercised, however, to be sure that nothing is said that cannot be proved. If this is done, the jury will remember that the attorney did not prove his point.

The Evidence

A discussion of this heading must be imprecise. We shall mention only a few problems that usually arise in regard to the introduction of evidence.

Usually, the first decision that the plaintiff's attorney has to make

[28] Coahoma County Bank & Trust Co. v. Feinberg, 241 Miss. 381, 128 So. 2d 562 (1961).

[29] Miss. Code Ann. § 1538 (1956).

is whether to call the defendant as an adverse witness. It is our opinion that this should be done only with reluctance and after careful consideration. In most instances the defendant has been carefully prepared, and his testimony has been carefully discussed with him, and he makes a good impression on the jury. As stated above, the first impression usually is the most important. Of course, if there is some particular reason for calling an adverse witness, such as proving agency or some other necessary legal question, it may be necessary to call the defendant adversely in the event the attorney does not have other proof.

If there are several witnesses that the attorney expects to put on the stand, necessarily some are stronger than others and will make better impressions. We recommend that the strong witnesses be put on first and last with the weaker ones in the middle.

Should the client be the first witness? We always recommend this unless there is a particular reason not to do so. In the first place, if he has to stay in the witness room while other witnesses testify and the case is lost, his layman's mind will often place the blame on something that happened while he was not present. We believe that the client should see and hear everything that goes on during the trial of the case.

Every lawyer has his own technique of interrogating witnesses. Attorneys have the opportunity to attend many seminars to hear discourses on the subject by nationally prominent attorneys. Of course, helpful information will be secured from all of these speakers, but each individual has to develop his own technique from his own study and experience. There is one thing that should always be kept in mind. We have never seen a witness take the stand who was not nervous. The witness should always be asked simple questions to which simple answers may be made. This should be done until it is ascertained that the witness has settled down and is mentally prepared to make proper answers to the attorney's questions.

As is attempted to be brought out throughout this article, any case that is worth trying, is worth trying in the best manner possible. The majority of personal injury cases involve x-rays. We certainly recommend that x-rays not be introduced unless they actually show something that adds to the case. An astute defense attorney will invariably wave the x-ray in the air during his closing argument and try to impress upon the jury that it shows nothing. If the x-rays do help, do not exhibit them in front of a window. Secure an x-ray viewing apparatus from a local doctor in the event there is not one available at the courtroom. This not only shows the x-ray correctly and permits the doctor to explain it fully, but will make an impression on the jury.

It should be sufficient to warn the young lawyer that it is necessary to introduce the medical and hospital bills and to prove their reasonableness and authenticity.[30] Often this can be done solely by the testimony of the attending physician. The hospital bills, physical therapy bills, etc., may be introduced for identification during the examination of the plaintiff and then introduced into evidence by the attending physician.[31]

In death cases, we realize that our courts take judicial notice of mortality tables.[32] We recommend, however, that this never be done and that the plaintiff always present an expert actuary or insurance company employee to prove these tables. This impresses the jury and, to say the least, the plaintiff's attorney has the satisfaction of hearing the word "insurance" during the progress of the trial.

We will not prolong this point by a detailed discussion of presenting medical evidence except to say that it should be done in line with a prior detailed conference with the physician. He should be advised before trial to use layman's language at all times possible. In the event an intricate operation has been performed on the plaintiff, it is always well to ask the physician to physically demonstrate to the jury the procedure used in the operation.

Regarding medical evidence, a problem frequently arises concerning the introduction of physicians by the defendant and the matter of waiving medical privileges by the plaintiff. In the event a physician is introduced by the defendant, we caution the plaintiff's attorney regarding the cross-examination of this physician. This cross-examination usually can be done in a dignified and unemotional manner, without harassing or offending the physician. We have seen cases lost because the plaintiff's attorney harassed a physician on cross-examination when several of the physician's patients were jurors.

Unfortunately, under our procedure, if the medical privilege is not waived by the plaintiff, the defendant may secure an instruction to the jury that the physician's evidence would have been adverse to the plaintiff.[33] Of course, if the testimony is very adverse, we certainly do not recommend waiving the privilege. On the contrary, we advise meeting it the best you can. However, if the plaintiff's attorney does not want

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[30] *See* Reynolds v. West, 237 Miss. 613, 115 So. 2d 742 (1959). *But see* Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1928), in which hospital records were held to be inadmissible because they contained reports of the attending physician.

[31] *See* cases cited, *supra* note 30.

[32] Tucker v. Gurley, 179 Miss. 412, 176 So. 279 (1937).

[33] Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 192 So. 577 (1940).

to call all the physicians because the physicians will not help or hurt, we certainly recommend that a letter be written to opposing counsel prior to trial advising that the privilege will be waived at the trial as to the physicians named therein. This would prevent the above mentioned instruction which often gives astute defense counsel a text upon which to base his argument.

We have found that in many cases the jury, in considering the extent of the plaintiff's damages, relies more on lay witnesses than medical witnesses. One or two neighbors who saw the plaintiff frequently during his period of disability will often add to the amount of the verdict.

In the event of severe disfiguration of the plaintiff's face, we recommend that there always be introduced a photograph of the plaintiff before the injury and a photograph of him at the time of the trial. The latter photograph is mainly for the supreme court as the plaintiff will not be before the court at the time the amount of the damages is considered.

In death cases, it is absolutely essential that thorough pre-trial conferences be held with the widow regarding essential testimony on the elements of damages, including loss of companionship, etc. Of course, lay witnesses are usually essential in connection with such proof, and as stated above, there now exists several professional appraising firms that may be used effectively to prove monetary loss in death cases.

The cross-examination of the defendant's witnesses could be discussed at length. However, we recommend that the plaintiff's attorney develop his own technique. It should be pointed out that the old adage of "asking one question too many" is definitely an elemental rule of trial practice. Make the point and stop. Without being critical, we have heard attorneys cross-examine by first getting the witness to repeat everything that he has said in answer to the questions of the defendant's attorney. This, of course, is not recommended as it merely impresses the testimony in the minds of the jury. As in the cross-examination of the defendant's physicians, extreme caution should be exercised in the manner of cross-examining every witness for the defendant. Unless circumstances are exceptional, it is never wise to browbeat a witness or be sarcastic unless it is obvious that he is lying. Juries, being composed of laymen, do not appreciate another layman being harassed. Often that particular witness has a friend on the jury, and if he is harassed, the attorney might as well concede his loss.

Many times, it impresses the jury favorably for the plaintiff's attorney not to ask any questions on cross-examination. This should be done if there is no particular reason to cross-examine.

INSTRUCTIONS

Here again, we might seem to be critical without tending to be. Many times we have seen trials and have read records wherein the plaintiff's case was lost by asking for and receiving too many instructions. Usually, only one or two instructions on liability are necessary. Each additional instruction only adds to possible reversible error.

Contrary to the view of some, jurors do read and consider instructions. There is one element of law in the trial that has lost more cases for the plaintiff than any other single element. That is, the requirement that the plaintiff prove his case by a "preponderance of the evidence."[34] Astute defense attorneys have won many cases on this instruction alone even though these decisions have resulted in gross miscarriages of justice. If we accomplish nothing else in this loosely organized discussion, our efforts will be justified if we can assist in overcoming this tremendous weapon for the defense.

Of course, all of the plaintiff's instructions have to qualify the elements of law set out therein by requiring that those elements be established by a preponderance.[35] All of the defendant's instructions are usually directed toward this burden of proof of the plaintiff. These instructions of the defendant are directed toward a connection of the statements of law in the instructions of the plaintiff with the arguments presented by the defendant's attorneys. This is always the main thrust taken by defense attorneys.

The average layman juror misconceives and usually completely misunderstands what is meant by the requirement that the plaintiff has to prove his case by a preponderance of the evidence. Every juror has a different idea of its meaning, but they usually equate it with the number of witnesses, the length of the presentation of each side of the case, their independent knowledge, television trials, criminal trial news articles and many other situations that are completely foreign to the real meaning of "preponderance of the evidence."

The thing to keep in mind is that the astute defense attorney may well win the case on this burden of proof unless positive steps are taken to anticipate and meet the situation. We have learned that the plaintiff should anticipate this argument, and should secure an instruction worded in such terms that he can clarify the situation completely in the minds of the jury in his final argument. We usually ask for an instruction in language similar to the following:

> The Court instructs the jury that a rule that a party is required to prove his claim by a preponderance of the evidence

[34] St. Louis-San Francisco Ry. v. Dyson, 207 Miss. 639, 43 So. 2d 95 (1949).
[35] *Id.*

> does not require such a degree of proof as produces certainty. It is not determined by the number of witnesses. To prove by a preponderance of the evidence merely means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as when compared and considered with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

It is apparent that if the attorney for the defense takes as his text the plaintiff's burden of proof, a discussion of an instruction similar to the above, if handled properly, would serve to offset the damage invariably done by a competent defense attorney.

There is no need to prolong this discussion by calling the plaintiff's attorney's attention to proper instructions on damages. In many opinions our court has laid out proper instructions in both personal injury and death cases.[86]

Final Argument

A. *Opening*

It should be more than merely academic that the arguments of attorneys are extremely important and should be handled sincerely and impressively.

At the risk of the judiciary believing themselves criticized, I have found that many judges, after both sides have rested and the instructions have been approved, take the attitude that we should now get in a big hurry, argue the case "ten minutes to a side" and let the jury go home. This often results in disaster to the plaintiff. We, therefore, impress on the plaintiff's attorney to do everything possible not to be hurried in his closing arguments. He must bear in mind that his closing argument likewise should not be of undue length. No attorney, regardless of his experience, can do his best, can think his best, or can convey his thoughts to the jury, if he is being hurried by the court. We submit with all deference, that a trial court that adopts this procedure is committing a grave injustice to the plaintiff.

The opening argument for plaintiff should be prepared as much as possible and should be conducted more or less in a narrative manner. The days of tactics such as shouting or Fourth of July speeches made to the jury are over. Jurors want to be convinced as to the merits of the case by the attorneys in a calm, unemotional but emphatic manner. The opening argument should mainly outline the case but should be a relatively full discussion. The various trial judges have varying rules per-

[86] *See generally* 1 J. Alexander, Mississippi Jury Instructions §§ 1672-1766 (1953).

taining to the extent to which the plaintiff's lawyer should cover the case in opening. Caution should be given the younger attorney that in some jurisdictions the defense lawyer is permitted to "drop the argument"[37] and if the plaintiff's lawyer has not developed his case sufficiently, he may be caught in a trap.

B. *Closing*

Other than the ability to take a non-suit,[38] the only advantage that the plaintiff's attorney has is the final argument to the jury. In our opinion this is the most important part of the trial. Invariably, some of the jurors have not yet made up their minds fully at that point. The more successful plaintiff's attorneys have worked long and hard to develop a convincing manner of handling the closing argument, and this takes work and preparation. Few cases are won by making a closing argument "off the cuff."

It is usually wise to remind the jury that nine of them may reach a verdict in a civil case[39] unless there is a suspicion that a good percentage of the jurors are doubtful in his client's favor.

Of course, the main purpose for the final argument is to answer the argument of the adversary. This should not be done with sarcasm or criticism and should not be done with a personal attack on the opposing attorney. We do not mean to imply that the final argument should not be firm, positive, direct and forceful. Every one of these elements should be used.

The final argument should usually be directed to the one or two main points that the attorney feels reasonably sure will make a good impression on the jury. This is the reason that the final argument should be considered at all times during the entire trial. The plaintiff's attorney should make it a practice to have a separate place for notes to be made throughout the entire trial that probably will be useful on final argument. Unless these notes are made, the point is many times forgotten. In almost every trial, something will occur or some witness will make a point that will be the most important point in your favor during the entire trial. Many times it is beneficial for the plaintiff's attorney to ignore the point at that time and to save it for final argument, at a time when the defense attorney will have no opportunity to answer. We have seen many cases won because an impressive and vital point was saved for final argument. As hereinbefore stated, justice requires that the plaintiff have some privilege to offset his burden of

[37] *E.g.*, Heddendorf v. Joyce, 178 So. 2d 126 (Fla. Ct. App. 1965).

[38] Miss. Code Ann. § 1538 (1956).

[39] Miss. Const. art. 3, § 31; Miss. Code Ann. § 1801 (1956).

proof throughout the trial. These impressive and important points in the final argument are the answer to the plaintiff's burden.

In personal injury cases as well as in death actions, it should be pointed out to the jury that the plaintiff is having his one day in court. Strangely enough, we have seen jurors who, after the trial, had the idea that the matter could be relitigated. This fallacy should be impressed clearly and strongly but in a calm and persuasive manner.

We hasten to remind the younger attorney not to get caught in making the "golden rule argument"[40] to the jury. He will usually be reversed, even though the jury is admonished to ignore such an argument, if a verdict is received.[41]

In concluding this point, we mention an error that we have seen on many occasions, i.e., the failure to frankly discuss with the jury what the amount of its verdict should be. Many times, after trial of cases, I have heard members of the jury state that they had no idea as to value of the plaintiff's case and did not know how to arrive at a lump sum amount. This failure usually results in a lower verdict and in many cases has resulted in a verdict lower than the offer of settlement. The plaintiff's attorney, in his closing argument, always should, in a humble and courteous manner, discuss with the jury his opinion as to what he thinks the amount of the verdict should be and his reasons. This, of course, should be short and concise.

Conclusion

We hope that what we have said here will at least encourage some younger lawyers to specialize in the representation of injured persons. It is no easy road and is usually traveled alone or with one or two associates. The young lawyer who enters the employment of a large firm will usually, of course, be on the side of the defendants. If we have done nothing else, we hope we have helped dissolve the myth that plaintiffs have an advantage over defendants before the courts and juries.

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[40] Copiah Dairies, Inc. v. Addkison, 247 Miss. 327, 153 So. 2d 689 (1963).
[41] *Id.*

STUDENT COMMENTS

WITHIN A DELICATE JURISDICTION: THE RIGHTS OF PARTIES BEFORE ZONING AUTHORITIES

I. Introduction

Steadily increasing urbanization has been a salient characteristic of American society in the twentieth century. As more and more people have crowded into cities, suburbs, and metropolitan areas, state and local governments have found it necessary to regulate the use of urban land through zoning legislation and zoning ordinances. New York City enacted the first noteworthy zoning ordinance in 1916.[1] Since 1926, when the United States Supreme Court upheld the constitutionality of zoning ordinances in the landmark decision of *Village of Euclid v. Ambler*,[2] virtually every urban area in the nation has been subjected to zoning.

When New York City adopted its zoning ordinance in 1916, it created a board of zoning appeals to administer the ordinance and thereby "established a pattern for zoning administration in the United States."[3] Variously called boards of appeal, boards of adjustment, or boards of review, these local authorities bear the heavy responsibility of implementing, administering, and amending zoning regulations. This task is not an easy one. As a distinguished American jurist, Benjamin N. Cardozo, pointed out when he was Chief Justice of the New York Court of Appeals: "There has been confided to the board a delicate jurisdiction and one easily abused."[4]

This delicate jurisdiction has often been abused in that the administration of zoning ordinances has been "erratic."[5] This inconsistent performance of zoning boards has been criticized continually for more than forty years,[6] and the volume of criticism has substantially increased in the years following the Second World War. As one study has pointed out:

> Within the last two decades, observers of the land planning process have suspected that something has gone wrong with

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[1] Anderson, *The Board of Zoning Appeals—Villain or Victim?* 13 Syracuse L. Rev. 353 (1962).

[2] 272 U.S. 365 (1926).

[3] Anderson, *supra* note 1, at 353.

[4] People *ex rel.* Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 155 N.E. 575, 578 (1927).

[5] Note, *Administrative Discretion in Zoning*, 82 Harv. L. Rev. 668 (1969).

[6] Anderson, *supra* note 1, at 354.

> the zoning board of adjustment. . . . With increasing vigor critics have charged that the boards of adjustment pay little attention to the legal limitations on their powers and operate without safeguards adequate to assure citizens of equal treatment.[7]

The reason that "the board of appeals in many cities has become a device of danger rather than safety"[8] is that zoning boards tend to operate in an informal manner, without procedural safeguards. Because the "essence of justice is largely procedural,"[9] the failure of zoning boards to follow rules of procedure has led to "arbitrary decision-making."[10] It is only when rules of procedure are adhered to that the rights of parties before administrative tribunals are safeguarded. Distinguished judges have emphasized this truth on many occasions. Mr. Justice Frankfurter has stated: "The history of liberty has largely been the history of observance of procedural safeguards."[11] Mr. Justice Jackson has written: "Procedural fairness and regularity are of the indispensable essence of liberty."[12] Or, in the words of Mr. Justice Douglas: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."[13]

II. Procedural Informality

Despite these forceful statements of constitutional principle, zoning boards generally have "not operated in such a manner as to assure citizens equal protection of the law."[14] State courts, which have tolerated such practices by zoning boards, apparently base their lenient attitudes on the fact that a zoning board "is an administrative body composed primarily, if not entirely, of persons without legal knowledge or experience. . . . Most courts apparently have concluded that a lay board cannot be expected to respect the niceties of informative pleading, articulate notice of hearing, minimal standards of proof, accurate recording of

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[7] Dukeminier and Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule,* 50 Ky. L.J. 273 (1962).

[8] Reps, *Discretionary Powers of the Board of Zoning Appeals,* 20 Law & Contemp. Prob. 280, 282 (1955).

[9] 1 K. Davis, Administrative Law Treatise § 7.20, at 506 (1958).

[10] Mandelker, *Delegation of Power and Function in Zoning Administration,* 1963 Wash. U.L.Q. 60.

[11] McNabb v. United States, 318 U.S. 332, 347 (1943).

[12] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953).

[13] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951).

[14] Dukeminier and Stapleton, *supra* note 7, at 322.

proceedings, or literate exposition of results."[15] As the Supreme Court of Errors of Connecticut has declared in regard to a local zoning body:

> It must be borne in mind . . . that we are dealing with a group of laymen who may not always express themselves with the nicety of a Philadelphia lawyer. Courts must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for technical infirmities in their actions.[16]

A zoning board is an "administrative agency"[17] and a "quasi-judicial body."[18] Since it is not a court, board hearings are not judicial proceedings.[19] The standards applied to these hearings are far less exacting than those applied to the proceedings of judicial tribunals.[20] A New York court recognized this fact as early as 1919,[21] and American jurists have stated on numerous subsequent occasions that zoning hearings should be conducted informally.[22] For example, the Supreme Court of Rhode Island has stated: "It is recognized that hearings before zoning boards of review are to a certain extent informal in nature and do not necessarily have to be conducted as are hearings before a court."[23] Chief Judge Stedman Prescott of the Court of Appeals of Maryland has said: "The zoning boards, in conducting their hearings, are not bound by the strict rules of evidence of a trial at law, but are permitted a reasonable discretion in admitting or excluding evidence."[24] An Indiana tribunal

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[15] 3 R. ANDERSON, AMERICAN LAW OF ZONING § 16.01, at 169, 171 (1968) [hereinafter cited as ANDERSON, ZONING].

[16] Couch v. Zoning Comm'n of Town of Washington, 141 Conn. 349, 106 A.2d 173, 178 (1954).

[17] Heath v. Mayor and City Council of Baltimore, 187 Md. 296, 49 A.2d 799, 803 (1946).

[18] Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625, 627 (1944).

[19] 8A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.263, at 218 (3d ed. rev. 1965).

[20] 3 ANDERSON, ZONING § 16.24, at 212.

[21] *See* West Side Mortgage Co. v. Leo, 174 N.Y.S. 451 (1919).

[22] *See, e.g.*, Mitchell Land Co. v. Planning and Zoning Bd. of Appeals of Town of Greenwich, 140 Conn. 527, 102 A.2d 316 (1953); Parsons v. Board of Zoning Appeals of City of New Haven, 140 Conn. 290, 99 A.2d 149 (1953); Dal Maso v. Board of County Comm'rs of Prince George's County, 238 Md. 333, 209 A.2d 62 (1965); Fandel v. Board of Zoning Adjustment of Boston, 280 Mass. 195, 182 N.E. 343 (1932); Krust v. Hill, 212 N.Y.S.2d 981 (Sup. Ct. 1961); 8A E. MCQUILLIN, *supra* note 19, § 25.256, at 198; 2 J. METZENBAUM, THE LAW OF ZONING 870 (2d ed. 1955); 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 43-10 (3d ed. 1962).

[23] Woodbury v. Zoning Bd. of Rev. of City of Warwick, 78 R.I. 319, 82 A.2d 164, 166 (1951).

[24] Bonnie View Country Club, Inc. v. Glass, 242 Md. 46, 217 A.2d 647, 652 (1966).

has declared that the procedure of a zoning board "is and should be, simple, less formal and less technical than that of judicial procedure."[25] Finally, a New York court has declaimed that

> . . . [T]he zoning board of appeals does not have the status of a court. There is nothing in the [zoning] statute to show an intent to vest the board with the judicial attributes of a court. The board is not called upon to follow procedure observed generally by courts. In fact, . . . the rules of practice and procedure which govern the courts of this state are not to be rigidly applied to a zoning board of appeals or to those who appear before it.[26]

III. The Limits of Informality

While the parties before a zoning authority do not enjoy the full panoply of procedural safeguards available before a court, a zoning hearing cannot be completely informal. As one commentator has explained, there eventually "comes a point at which further cutting away of procedural safeguards cannot be tolerated."[27] When the informality of a zoning hearing goes beyond that point, courts will overturn the action of the zoning board.[28]

While courts have been hesitant to lay down an exact boundary where informality ends and strict procedural requirements begin,[29] they have generally held that "the attitude and conduct of members of the [zoning] board should be judicial and impartial."[30] Since zoning agencies are "not vested with despotic and arbitrary powers," they "must act intelligently and fairly and within the domain of reason."[31] One treatise writer has stated that a zoning hearing "must be fair in all respects,"[32] and several courts have enunciated this same principle. For example, the Supreme Court of Rhode Island has explained that, while zoning boards are allowed considerable latitude in conducting hearings, such "latitude is limited . . . by a fundamental requirement that such hearings be basically fair and impartial . . . ."[33] In a later decision, the same

[25] Devon Civic League, Inc. v. Marion County Board of Zoning Appeals, 224 N.E.2d 66, 70 (Ind. App. 1967).

[26] Ellish v. Goldman, 117 N.Y.S.2d 867, 869 (Sup. Ct. 1952).

[27] Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A. L. Rev. 937, 950 (1965).

[28] Galvin v. Murphy, 11 App. Div. 2d 900, 203 N.Y.S.2d 151 (1960).

[29] 1 Anderson, Zoning § 4.16, at 182.

[30] 8A E. McQuillin, *supra* note 19, § 25.262, at 214; *see also* Wilcoxen, *Procedures Before Zoning Boards of Adjustment*, 19 Okla. L. Rev. 29, 40 (1966).

[31] People *ex rel.* Home for Hebrew Infants of City of New York v. Walsh, 131 Misc. 581, 227 N.Y.S. 570, 573 (Sup. Ct. 1928).

[32] 2 A. Rathkopf, *supra* note 22, at 44-1.

[33] Lumb v. Zoning Bd. of Rev. of Town of Bristol, 91 R.I. 498, 165 A.2d 504, 506 (1960).

tribunal ruled that zoning boards "are not without some restraint in the conduct of their hearings and they may not so conduct them as to deprive parties thereto of a fair and impartial hearing."[34] In a similar vein, the Court of Appeals of New York has held that "no essential element of a fair trial can be dispensed with . . . ."[35]

Moreover, in conducting a hearing, a zoning board "must comply with rules of conduct prescribed by the state legislature, or by the local legislature acting under a direction or permission from the state legislature."[36] Where enabling statutes do not set forth procedural rules for zoning boards, it is presupposed that these bodies will establish procedural standards to insure orderly hearings.[37] That there should be such standards to guide zoning officials is "a fundamental constitutional rule applicable to all municipal legislation."[38]

Consequently, the Standard State Zoning Enabling Act provides that a local zoning board should adopt rules to govern its proceeding.[39] Using the zoning ordinance of Denver, Colorado, as a model, Professor Robert M. Anderson of the Syracuse University College of Law suggests that procedural rules should include at least the following requirements:

> (1) Public notice shall be given of all hearings and all hearings shall be open to the public.
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> . . . .
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> (3) At any public hearing . . . any . . . interested party may appear in person or by agent or by attorney, offer evidence and testimony and cross-examine witnesses.
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> . . . .
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> (6) For each case or matter heard, the Board shall cause a record of its proceedings to be prepared. The record of proceedings shall include all documents and physical evidence considered in the case together with stenographic notes of all public proceedings. The stenographic notes should include, but need not be limited to, the verbatim testimony offered by all witnesses in the case. . . . The record of proceedings . . . shall show the grounds for each decision . . . . The record of

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[34] Tuite v. Zoning Bd. of Rev. of City of Woonsocket, 191 A.2d 155, 157 (R.I. 1963).

[35] Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421, 425 (1954).

[36] E. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 131 (1940). *See also* Anderson v. Jester, 206 Iowa 452, 221 N.W. 354 (1928).

[37] 2 A. RATHKOPF, *supra* note 22, at 44-7.

[38] 8A E. MCQUILLIN, *supra* note 19, § 25.216, at 103-04.

[39] United States Dep't of Commerce, Standard State Zoning Enabling Act § 7 (1926), as cited in 4 ANDERSON, ZONING § 26.01, at 7.

> proceedings shall be filed in the office of the Board and shall be a public record.[40]

However, in many jurisdictions no such ordinance governing procedures before zoning boards has been adopted. When the conduct of a zoning hearing is attacked in these jurisdictions, the courts have fallen back on the principle that the hearing "must be governed by established rules of procedure applicable generally to administrative tribunals."[41]

Having in mind these general tenets governing the procedure of zoning boards, one can now advance to an examination of the various aspects of a zoning hearing and to an analysis of the rights of the public in relation to each aspect.

IV. The Requirement of a Public Hearing

A fundamental canon of zoning law is that zoning regulations, restrictions, modifications, and amendments can be made only after a public hearing. Such a hearing, which is "a prerequisite to a decision on the merits,"[42] is ordinarily provided for in the enabling legislation. The Mississippi statute on the matter is typical; it provides that no zoning ordinance "shall become effective until after a public hearing, in relation thereto, at which parties in interest, and citizens, shall have an opportunity to be heard."[43]

Exactly what does a public hearing entail? According to the Supreme Court of Illinois, the words "public hearing" mean "the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented by opposing parties."[44] While a zoning board may deliberate in private, it can take official action only in a public session.[45] In the decision of *Wolf v. Zoning Board of Adjustment of Borough of Park Ridge*,[46] a New Jersey court reversed the action of local zoning authorities taken in an executive session from which the public was excluded. In the words of a New York court:

> Only action taken by a board when convened in a meeting open to the public attains the stature of an official determination. Action taken by the board while in executive session . . . is illegal and void. . . . To be effective, the powers of the Board of Zoning and Appeals, affecting the property rights of persons

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[40] 4 Anderson, Zoning § 28.10, at 295-96.

[41] Flick v. Galey, 328 Ill. App. 81, 65 N.E.2d 137, 139 (1946); Jarrell v. Board of Adjustment of City of High Point, 258 N.C. 476, 128 S.E.2d 879, 883 (1963).

[42] 58 Am. Jur. *Zoning* § 222, at 1059 (1948).

[43] Miss. Code Ann. § 3593 (1956).

[44] Braden v. Much, 403 Ill. 507, 87 N.E.2d 620, 623 (1949).

[45] 3 Anderson, Zoning § 16.25, at 214.

[46] 79 N.J. Super. 546, 192 A.2d 305 (1963).

> subject to its jurisdiction, must be exercised in a meeting open to the public at which each board member voting openly announces his vote at the time he gives it for recording by the clerk of the board.[47]

As one prominent authority on municipal government has explained: "Compliance with the statutory procedure is a prerequisite to any valid change in a zoning ordinance, since a zoning ordinance amendment must be proposed and adopted with the same formality as the original ordinance."[48] The Supreme Court of Mississippi has made a similar statement: "A zoning ordinance, to be valid, must be pursuant to, and in substantial conformity with, the zoning statute authorizing it. . . . It is invalid to the extent of its inconsistency with the statute. . . . The statutory method of amendment must be followed."[49] Where the statutory method of amendment is not followed, as in a case where the minutes of the zoning authority are not signed by the mayor and attested to by the city clerk, the zoning amendment is invalid.[50]

V. The Requirement of Notice

Another major statutory requirement that is a prerequisite to the enactment of a zoning regulation is the provision for notice. Along with the previously discussed requirement of public hearing, notice is an "essential requirement of procedural due process."[51] As Professor Anderson has pointed out:

> The tolerance of informality which is reflected in the judicial decisions which relate to pleadings, rules of evidence, and other aspects of board procedure, is less evident where notice and hearing are involved. These are regarded as essential ingredients of administrative justice, and substantial or even literal compliance . . . is required. Statutory notice and hearing requirements are regarded as mandatory.[52]

Courts in various jurisdictions have enforced this principle. In New York, the Board of Zoning Appeals of the City of Buffalo was held to have acted without authority because of a failure to give the required notice.[53] The Supreme Court of Errors of Connecticut has emphasized that a zoning board of appeals "must conduct a public hearing on each and every application submitted to it and give timely

[47] Blum v. Board of Zoning and Appeals of Town of North Hempstead, 1 Misc. 2d 668, 149 N.Y.S.2d 5, 8 (Sup. Ct. 1956).

[48] C. Rhyne, Municipal Law § 32-3, at 824 (1957).

[49] City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 94, 121 So. 2d 120, 124 (1960).

[50] Ballard v. Smith, 234 Miss. 531, 107 So. 2d 580 (1958).

[51] 2 Am. Jur. 2d *Administrative Law* § 399, at 204 (1962).

[52] 3 Anderson, Zoning § 16.17, at 199.

[53] *In re* Buffalo Cremation Co., 249 N.Y. 531, 164 N.E. 572 (1928).

and adequate notice . . . ."[54] Calling the duty to give notice of a hearing "a prerequisite to the exercise of jurisdiction by the board," the Supreme Court of Rhode Island delivered this fiat:

> The giving of such notice is not merely directory, nor a practice, custom or usage of the board, but is an applicable provision of the town ordinances which establish the jurisdiction of the board. In the circumstances herein we are of the opinion that the failure to give the notice prescribed . . . deprived the board of jurisdiction to grant the application.[55]

The northeastern states are not the only ones to have announced this precept. The Supreme Court of Mississippi, interpreting an enabling statute that allows zoning action to be taken only "upon at least fifteen (15) days' notice of a hearing . . . , said notice to be given in an official paper or a paper of general circulation in such municipality specifying a time and place for said hearing."[56] has twice declared zoning action invalid for lack of notice. In a 1939 opinion, Chief Justice Sydney Smith pointed out that notice of fifteen days is required "so that the citizens may know exactly what is intended to be done and be able to express an intelligent opinion thereon." Because notice was not given until after the ordinance was adopted, Chief Justice Smith ruled that "the zoning ordinance is void."[57]

Twelve years later the Mississippi tribunal decreed that a zoning ordinance was invalid on account of improper notice where the published notice did not give the name of the city or place where the hearing would be held. The court said that state law makes

> . . . [T]he holding of a public hearing a condition precedent to the enactment of zoning regulations, and a lawful public hearing presupposes the giving of requisite notice. The giving of such notice therefor is indispensable to confer upon the municipal legislative body jurisdiction of the parties in interest. We are, therefore, of the opinion that the said notice was fatally defective in failing to meet essential statutory requirements and it follows, of course, that the [zoning] ordinance attempted to be adopted was void.[58]

VI. Swearing of Witnesses

If the prescribed notice of a hearing on a proposed zoning ordinance has been given, the zoning board commonly assembles in the hearing

[54] Lunt v. Zoning Bd. of Appeals of Town of Waterford, 150 Conn. 532, 191 A.2d 553, 557 (1963).

[55] Radick v. Zoning Bd. of Rev. of Town of East Providence, 83 R.I. 392, 117 A.2d 84, 85 (1955).

[56] Miss. Code Ann. § 3594 (Supp. 1968).

[57] Morris v. City of Columbia, 184 Miss. 342, 350, 186 So. 292, 293 (1939).

[58] Brooks v. City of Jackson, 211 Miss. 246, 253-54, 51 So. 2d 274, 277 (1951).

room at the appointed time. When the chairman calls the meeting to order, the person seeking the zoning change is invited to present his case. He may call witnesses to testify in support of his position. When the applicant has finished presenting his position, the protestants are allowed to testify. If one or both sides is represented by counsel, the hearing may be conducted in a manner somewhat like courtroom procedure. The procedure is often so informal and non-technical that the witnesses are not sworn by the board.[59]

This failure to swear witnesses has raised procedural problems in some jurisdictions. The Ohio Supreme Court, holding that there was no competent evidence placed in the record because of the refusal of the chairman of the zoning board to have any of the witnesses sworn, overturned the action of the zoning board in one case.[60] On the other hand, the rule in California appears to be that witnesses before a zoning authority need not be sworn.[61] The leading American decision on this point arises out of New Jersey, wherein the Supreme Court of that state made this pronouncement:

> The statute does not define rules of procedure for the applicant to follow in the presentation of its case, but the rule-making power given the board . . . contemplates that certain standards of guidance will be promulgated to insure an orderly hearing. A rigid formality is neither practical or necessary . . . . We make the observation, however, that the regard accorded to proceedings before the municipal body is considerably enhanced where oaths are administered to witnesses for the applicant and for the opposition and a stenographic record is made.[62]

VII. Stenographic Record

The mention of a stenographic record raises still another problem concerning the proceedings before zoning boards. "Explanations of board proceedings are frequently unavailable to the courts, either because records do not exist at all or because they fail to explain the reasoning which underlies decisions."[63] But as one authority has stated, "If rights are to be firmly fixed on the basis of board hearings, some records must be kept. If judicial review is to be an efficient bulwark against arbitrary conduct, such records must be accurate, and reasonably complete."[64]

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[59] 3 Anderson, Zoning § 16.30, at 221-22.

[60] Arcos Bros. Builders, Inc., v. Zoning Bd. of Appeals of City of North College Hill, 7 Ohio St. 2d 32, 218 N.E.2d 179 (1966).

[61] Flagstad v. City of San Mateo, 156 Cal. App. 2d 72, 318 P.2d 825 (1958).

[62] Tomko v. Vissers, 21 N.J. 226, 121 A.2d 502, 509 (1956).

[63] *Administrative Discretion in Zoning, supra* note 5, at 683.

[64] 3 Anderson, Zoning § 16.27, at 218.

While zoning enabling acts usually require that a public record of the votes of a zoning board be made and that a copy of any ordinance enacted be placed in the municipal records, there is no requirement that a full verbatim transcript of a zoning hearing be made by a stenographer.[65] It has been said that a zoning board "is required to keep a reasonably accurate summary of the oral testimony and the facts upon which it bases a decision."[66] The Supreme Court of Rhode Island, while stating that a stenographic record of proceedings is not a necessity, has asked zoning authorities to keep at least a fair record of the proceedings in the interest of justice.[67] Connecticut has adopted a better practice by requiring zoning authorities to furnish a transcript of the hearing whenever zoning decisions are appealed to the courts. For as the Supreme Court of Errors of Connecticut has emphasized: "The absence of a transcript deprived the court of a proper record on which to review the proceedings of the board."[68] Other jurisdictions would do well to follow the lead of Connecticut. As one critical observer has noted: "Much of the current uncertainty in zoning law can be obviated by a little more industry on the part of the boards in their record keeping."[69]

VIII. Evidence

As one might expect, zoning boards "are not bound by the technical common law rules of evidence . . . ."[70] In the words of one analyst: "While the evidence presented to, or considered by, the board should be competent and relevant, it need not be of the same character as that which would be required for presentation to a court."[71] Appellate courts generally encourage zoning boards "to be permissive rather than restrictive in the admission of evidence."[72] A zoning board that evinces a restrictive attitude may earn criticism from a reviewing court.[73]

A decision by zoning authorities is subject to review "for the purpose of ascertaining whether it contains any legally competent evidence

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[65] E. Bassett, *supra* note 36, at 118.

[66] 3 Anderson, Zoning § 16.27, at 219.

[67] Jacques v. Zoning Bd. of Rev. of City of Pawtuckett, 64 R.I. 284, 12 A.2d 222 (1940); Robinson v. Town Council of Narragansett, 60 R.I. 422, 199 A. 308 (1938).

[68] London v. Zoning Bd. of Appeals of City of Bridgeport, 150 Conn. 411, 190 A.2d 486, 489 (1963).

[69] Note, *Discretionary Powers of Zoning Boards of Adjustment in Pennsylvania*, 97 U. Pa. L. Rev. 68, 79 (1948).

[70] Dal Maso v. Board of County Commissioners of Prince George's County, *supra* note 22, 209 A.2d at 64.

[71] 101 C.J.S. *Zoning* § 305, at 1087 (1958).

[72] 3 Anderson, Zoning § 16.31, at 223.

[73] Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A.2d 612 (1964).

that reasonably supports the finding or decision. . . ."[74] Or, as the Supreme Court of Mississippi has said:

> In the final analysis the scope of inquiry by a court upon appeal from the legislative acts of the zoning authority is limited to a determination of whether its decision is reasonable and proper according to the facts before it, or in other words, whether its decision is supported by substantial evidence.[75]

In determining whether a decision is supported by substantial evidence, a court is confined to the evidence in the record of the zoning board.[76] As long as there is some legal evidence in the record upon which the board could base its decision, the decision must be upheld.[77] But where there is no substantial evidence in the record to support the finding of a zoning board, that finding will be overturned.[78]

There is a question as to what constitutes substantial evidence, especially since such non-expert witnesses as litigants, neighboring property owners, taxpayers, and officers of civic organizations frequently testify before zoning boards. While boards may receive the testimony of such laymen, a decision based entirely on non-expert opinion is not supported by substantial evidence.[79] For example, the Supreme Court of Rhode Island has ruled that "testimony by non-expert witnesses that erection of a gasoline station on a street corner would depreciate neighborhood property and that an increasing flow of traffic would result in such congestion as to be a hazard are lay judgments, lacking in expertise and therefore without probative force."[80] Or, as that same tribunal expressed in another decision:

> Here, the only evidence supportive of the board's findings on the adverse economic consequent to the neighboring property and on the traffic conditions came from non-expert witnesses and took the form of conclusional statements unsupported by factual data or background . . . It obviously was a lay judgment . . . and as such could have probative force under our law only if voiced by an expert.[81]

As is intimated in the last phrase of the preceding statement, ex-

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[74] Caluori v. Zoning Bd. of Rev. of Town of Johnston, 216 A.2d 515, 517 (R.I. 1966).

[75] Paine v. Underwood, 203 So. 2d 593, 597 (Miss. 1967).

[76] Cow Hollow Improvement Club v. DiBene, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1966).

[77] 2 A. RATHKOPF, *supra* note 22, at 43-5.

[78] City of Hattiesburg v. Pittman, 233 Miss. 544, 102 So. 2d 352 (1958).

[79] 3 ANDERSON, ZONING § 16.36, at 229.

[80] Goldstein v. Zoning Bd. of Rev. of City of Warwick, 227 A.2d 195, 198 (R.I. 1967).

[81] Thomson Methodist Church v. Zoning Bd. of Rev. of City of Pawtuckett, 210 A.2d 138, 142 (R.I. 1965).

pert witnesses can provide substantial evidence to support the findings of a zoning board. In recent years such expert witnesses as professional planners and real estate brokers have become frequent participants in zoning hearings.[82] But the opinions of expert witnesses are not always decisive. For as one authority has said "Even the testimony of expert witnesses may be weighed, and found wanting, by the board of appeals."[83]

As the opinion of expert witnesses is not always determinative, so too does the opinion of the city attorney fail to constitute substantial evidence.[84] Regarding attorneys, it has also been held that assertions by counsel for the parties before a zoning board do not constitute substantial evidence that will support the findings of the board.[85] Moreover, petitions, letters, and written statements placed in the record by those who do not personally appear at the hearing carry little weight and do not constitute substantial evidence.[86]

Since zoning hearings are often attended by large numbers of emotional property owners and since zoning boards are naturally reluctant to alienate a bloc of voters, the boards must take care that their findings are not based on winning the favor of those present at the hearing. Where such is the case, courts will annul the decision of a zoning board.[87] A Texas court has said that "in basing its action on the wishes of a majority of the citizens appearing in favor or in opposition to the matter," a local zoning body failed "to exercise the sound judgment and discretion required in such cases."[88] Similarly, the Supreme Court of Rhode Island has decreed that the "remonstrances of neighboring landowners are not in any way conclusive on a zoning board of review and cannot control its action . . . ."[89]

Moreover, the action of a zoning authority cannot be controlled by the recommendations of planning boards, city engineers, or advisory bodies.[90] Whenever "a board of adjustment relies wholly upon the reports or opinions of administrative officials, it defaults its responsibility to exercise its discretion."[91] As the Court of Appeals of Maryland has pointed out:

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[82] 3 ANDERSON, ZONING § 16.36, at 230.

[83] 2 A. RATHKOPF, *supra* note 22, at 43-5.

[84] 3 ANDERSON, ZONING § 16.40, at 241.

[85] St. Mary's Church of New Brunswick v. Board of Adjustment of City of New Brunswick, 14 N.J. Misc. 688, 184 A. 516 (1936).

[86] 2 A. RATHKOPF, *supra* note 22, at 44-6.

[87] *Id.* at 43-19, 43-20, 44-2.

[88] Brehmer v. City of Kerrville, 320 S.W.2d 193, 196 (Tex. Civ. App. 1959).

[89] Jenney Mfg. Co. v. Zoning Bd. of Rev. of Town of East Providence, 63 R.I. 477, 9 A.2d 705, 707 (1939).

[90] Sanderson v. City of Hattiesburg, 249 Miss. 656, 163 So. 2d 739 (1964).

[91] 3 ANDERSON, ZONING § 16.39, at 239.

> The recommendation of these officials is to be given consideration by the Board . . . . , [but] if the Board, based on evidence to the contrary, does not agree with the recommendation of these officials, it is not required to follow their recommendation.[92]

IX. Personal Knowledge of Board Members

Since members of a zoning board ordinarily have resided in their community for many years, they are naturally going to make use of their personal knowledge of the community in deciding zoning disputes. But reliance on personal knowledge raises questions of fairness. As Professor Anderson asks: "Is a hearing fair when decisive evidence is gathered beyond the hearing room? How is a party to the proceeding to test the accuracy of the board's information, challenge the relevance of the board's knowledge, or present evidence which refutes or outweighs it?"[93]

The reaction of courts to this problem was well expressed by Chief Judge Albert Conway of the New York Court of Appeals:

> It is well established law that a board may act upon its own knowledge of conditions . . . . , but the mere conclusory statement in the findings of its personal knowledge . . . does no more than demonstrate or establish the basis for the board's arrival at the factual findings. When the board does so act, it is incumbent upon it to set forth in its return the facts known to the members, but not otherwise disclosed.[94]

This decision appears to express the general rule that members of the zoning board "may act upon their knowledge of the character of the district if they make known the nature of such knowledge in their decision."[95] It has been held that board members may exercise their personal knowledge in a proper case "even without the hearing of witnesses."[96]

In a similar matter, courts have held that a zoning board may visit and inspect the site that is the subject of the zoning controversy and rely for its decision on the personal knowledge thus gained, but that "the facts so ascertained or known must be set forth in the record so

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[92] Hoffman v. Mayor and City Council of Baltimore, 187 Md. 593, 51 A.2d 269, 271 (1947).

[93] Anderson, Zoning § 16.37, at 230-31.

[94] Community Synagogue v. Bates, 1 N.Y.2d 445, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 22 (1956).

[95] Perrier v. Board of Appeals of City of Pawtuckett, 86 R.I. 138, 134 A.2d 141, 146 (1957). *See also* Russo v. Stevens, 7 App. Div. 2d 575, 184 N.Y.S.2d 989 (Sup. Ct. 1959); Noyes v. Zoning Bd. of Review of City of Providence, 95 R.I. 201, 186, A.2d 70 (1962).

[96] Aisloff v. Murdock, 81 N.Y.S.2d 872, 875 (Sup. Ct. 1948).

that the court, on review, can scrutinize the basis of the decision."[97] As the Supreme Court of Rhode Island has explained: "To sustain a decision on the basis of the board's acting on knowledge acquired by inspection, the record must contain some reasonable disclosure as to the knowledge so acquired and their action pursuant thereto."[98]

X. Cross-Examination of Witnesses

In recent years the question of whether parties to a zoning hearing are entitled to cross-examine witnesses has become a matter of increasing controversy. There is a division on this point among the various jurisdictions. The New York courts, while holding that the denial of cross-examination is "unwise,"[99] have nevertheless refused to say that cross-examination in zoning hearings is a right.[100] In Rhode Island, where the question "would appear to be in a state of flux,"[101] it was also stated that there is nothing in the law which entitles litigants in a zoning controversy "to cross-examine opposing witnesses as a matter of right."[102] However, the Supreme Court of Rhode Island has also declared in a more recent decision that the "interest of justice might well be better served if some reasonable cross-examination were permitted . . . ."[103] In its most recent pronouncement on the matter, that tribunal, while refusing to go so far as to invalidate the zoning decision because of a denial of cross-examination, stated that such denial was "a practice with which we have long been dissatisfied" and suggested that "cross-examination be permitted in appropriate cases."[104] Perhaps in its next decision on the question the Rhode Island tribunal will go one step further and join what appears to be the emerging majority viewpoint:

> The right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process

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[97] 2 A. Rathkopf, *supra* note 22, at 43-14.

[98] Kelly v. Zoning Bd. of Rev. of City of Providence, 94 R.I. 298, 180 A.2d 319, 322 (1962). *See also* Dawson v. Zoning Bd. of Rev. of Town of Cumberland, 97 R.I. 299, 197 A.2d 284 (1964); Trovato v. Chiaradio, 95 R.I. 326, 186 A.2d 736 (1963).

[99] Socony Vacuum Oil Co. v. Murdock, 165 Misc. 713, 1 N.Y.S.2d 574, 580 (Sup. Ct. 1937).

[100] Muscillo v. Town of Oyster Bay, 28 Misc. 2d 79, 211 N.Y.S.2d 939 (Sup. Ct. 1961).

[101] Annot., 27 A.L.R.3d 1304, 1306 (1969).

[102] Colagiovanni v. Zoning Bd. of Rev. of City of Providence, 90 R.I. 329, 158 A.2d 158, 162 (1960).

[103] Zimarino v. Zoning Bd. of Rev. of City of Providence, 95 R.I. 383, 187 A.2d 259, 262 (1963).

[104] Westminster v. Zoning Bd. of Rev. of City of Providence, 238 A.2d 353, 360, 361 (R.I. 1968).

> of law or the right to a hearing, and no one may be deprived of such right . . . .[105]

The Court of Appeals of Maryland has endorsed this principle and has expressed it on several occasions in zoning decisions. The Maryland tribunal has variously declared that "a reasonable right of cross-examination must be allowed the parties,"[106] that "the opportunity for reasonable cross-examination is a basic right,"[107] and that "there was a prejudicial denial of due process of law by the [zoning] board's refusal to permit cross-examination of the applicant's witnesses . . . ."[108]

Likewise, the United States District Court for the District of Columbia has criticized the denial of cross-examination in a zoning hearing as a grave procedural defect,[109] and the Connecticut courts have determined that the "practice of the [zoning] board of denying an opportunity for cross-examination cannot be sanctioned."[110] The courts of two jurisdictions have made this statement:

> While a hearing of this nature may be more or less informal, and technical legal rules of evidence and procedure may be disregarded, no essential element of a fair trial can be dispensed with. The party whose rights are being determined must be given the opportunity to cross-examine witnesses . . . .[111]

Perhaps it is because cross-examination "is the greatest aid to the ascertainment of the truth which the advocate possesses"[112] that state courts have come to require cross-examination in zoning hearings. In so requiring, the state courts have begun to apply to zoning hearings the same standard that has long been required of federal administrative bodies. This standard was expressed four decades ago by the United States Court of Appeals for the District of Columbia Circuit: "The provision for a hearing implies that the applicant is entitled to an opportunity to . . . cross-examine the witnesses . . . ."[113] Or, as the United

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[105] 2 AM. JUR. 2d *Administrative Law* § 424, at 234 (1962). *See also* Annot., *supra* note 101, at 1305.

[106] Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578, 585 (1966).

[107] Town of Somerset v. Montgomery County Bd. of Appeals, 245 Md. 52, 225 A.2d 294, 302 (1966).

[108] Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289, 297 (1967).

[109] Hot Shoppes, Inc. v. Clouser, 231 F. Supp. 825 (D.D.C. 1964), *aff'd*, 120 App. D.C. 353, 346 F.2d 834 (D.C. Cir. 1965).

[110] Wadell v. Board of Zoning Appeals of City of New York, 136 Conn. 1, 68 A.2d 152, 156 (1949).

[111] Branche v. Board of Trustees of Incorporated Village of Great Neck, 141 N.Y.S.2d 477, 478 (1955); Jarrell v. Board of Adjustment of City of High Point, *supra* note 41, 128 S.E.2d at 883.

[112] *In re* Naturalization of Fordiani, 99 Conn. 551, 121 A. 796, 799 (1923).

[113] Saltzman v. Stromberg-Carlson Telephone Mfg. Co., 60 App. D.C. 31, 46 F.2d 612, 614 (D.C. Cir. 1931).

States Supreme Court, speaking through Mr. Justice Lamar, said in an even earlier opinion:

> But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. . . . All parties . . . must be given opportunity to cross-examine witnesses . . . . In no other way can a party maintain its rights or make its defense.[114]

Of course, not every participant in a zoning hearing is entitled to cross-examine witnesses. The Court of Appeals of Maryland has pointed out that, while parties in the hearing may cross-examine, "the right of cross-examination of a person who merely attends the hearing is by no means coextensive with the right of those who are actually parties to the proceeding."[115] To allow every property owner attending a zoning hearing to cross-examine each witness could result only in delay and confusion.

It is interesting to note that parties to a zoning proceeding may waive their right of cross-examination by failure to object to the denial of that right. The Maryland courts are of the opinion that parties "who did not specifically request the right to cross-examination have waived it."[116] Similarly, the Supreme Court of Mississippi advanced this recent holding:

> The remaining assignments of error, that the counsel denied appellants their constitutional right of cross-examination and confrontation of adversaries . . . , is not well taken since no objection was made by the protestants to the procedure followed by the city.[117]

XI. Board Findings and Opinions

Zoning boards have been criticized because they seldom prepare a written opinion setting forth the basis for their decisions.[118] In such instances, courts have a difficult time properly reviewing these decisions. But where the record is complete and articulate, the court can review issues with dispatch. Commentators have therefore suggested that zoning boards, upon completion of hearings, make written determinations

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[114] Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 93 (1913).

[115] Bayer v. Siskind, 247 Md. 115, 230 A.2d 316, 320 (1967).

[116] Gibson v. Talbot County Bd. of Zoning Appeals, 250 Md. 292, 242 A.2d 137, 141 (1968).

[117] McKibben v. City of Jackson, 193 So. 2d 741, 745 (Miss. 1967).

[118] Dukeminier and Stapleton, *supra* note 7, at 331.

explaining their findings.[119] For as one advocate of this practice has perorated:

> One of the safeguards the common law developed against arbitrary decisions is the practice, usually adhered to, of judges giving reasons or opinions. This requires a judge to justify his decision by doctrine, statute, policy, or logic, with an eye to previous cases with similar facts. Opinion writing thus generates a compelling pressure toward continuity and equal protection of the law.[120]

There are, of course, many zoning authorities in the United States which do issue written opinions with their decisions. In doing so, however, these authorities must take care not to run afoul of statutory and judicial requirements governing their findings. For example, findings may be "fatally defective which omit an issue essential to the decision made by the board . . . ."[121] The Supreme Judicial Court of Massachusetts has reversed zoning findings which did not meet statutory requirements.[122] A District of Columbia zoning decision was overturned by a federal court for lack of specificity. Said the court:

> We hold only that in a given case the [zoning] Board must assume responsibility of expressing the basic facts on which it relied with sufficient specificity to convey to the parties, as well as to the court, an adequate statement of the facts which persuaded the Board to arrive at its decision.[123]

The findings of zoning boards are often criticized for being conclusionary. Those findings which are conclusionary in form are not sufficient to support a zoning decision,[124] and courts have been quick to overturn decisions that are conclusionary.[125] As a New York court has stated:

> The decision of the [zoning] Board sets forth no facts relied upon to sustain its determination . . . . Mere vague statements with such words as "health," "safety," "morals," "general welfare," "practical difficulties and unnecessary hardships" merely repeat legal statements or conclusions; they are not findings of fact upon which the Board's determination is based.[126]

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[119] 3 ANDERSON, ZONING § 16.41, at 242.

[120] Dukeminier and Stapleton, *supra* note 7, at 331.

[121] 3 ANDERSON, ZONING § 16.43, at 248.

[122] Zinck v. Zoning Bd. of Appeals of Framingham, 345 Mass. 394, 187 N.E.2d 665 (1963); Gaunt v. Board of Appeals of Methuen, 327 Mass. 380, 99 N.E.2d 60 (1951).

[123] Robey v. Schwab, 113 App. D.C. 241, 307 F.2d 198, 202 (D.C. Cir. 1962).

[124] 3 ANDERSON, ZONING § 16.44, at 249.

[125] *See, e.g.*, Kosoglad v. Zoning Bd. of Appeals of City of Chicago, 47 Ill. App. 2d 216, 198 N.E.2d 216 (1964); Clark v. County Bd. of Appeals of Montgomery County, 235 Md. 320, 201 A.2d 499 (1964).

[126] Hattem v. Silver, 19 Misc. 2d 991, 197 N.Y.S.2d 535, 536 (Sup. Ct. 1959).

The requirement that a zoning board set forth the facts on which it based its decision is simply "not satisfied by a mere repetition of the statutory words,"[127] which require zoning ordinances to promote the public health and welfare.

XII. Conclusion: The Need for Procedural Rules

This mention of conclusionary findings brings to an end this examination of the various components that constitute a hearing before a zoning board. One can readily agree with critics that a hearing offers a great potentiality for abuse of personal rights and denial of due process.[128] The most satisfactory method of avoiding these dangers is for state legislatures, municipal governing authorities, or zoning boards themselves to adopt definite rules of procedure.[129] Such rules would "apply equally to all" and would "insure the same treatment for one applicant as for another."[130] In the long run, such procedural rules would not only make for more efficient zoning administration but would also neutralize much of the criticism directed at zoning boards today. Most importantly, however, the adoption of specific procedural regulations would enable zoning boards to render the highest possible standard of justice to those citizens who depend on these boards to regulate the use and enjoyment of urban land.

James A. Peden, Jr.

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[127] Brackett v. Board of Appeals of City of Boston, 311 Mass. 52, 39 N.E.2d 956, 958 (1942).

[128] *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform, supra* note 27, at 953.

[129] Reps. *supra* note 8, at 295.

[130] 2 J. Metzenbaum, *supra* note 22, at 873.

A CASE FOR THE ABROGATION OF MUNICIPAL TORT IMMUNITY IN MISSISSIPPI

I. Background

The crux of my probing investigation into the field of tort liability pertaining to municipalities, in general, rests of necessity upon the dual nature and characteristics of these chameleon-like subdivisions of the state. While viewed as being possessed of governmental powers, functions and responsibilities, cities, towns and the other smaller municipal entities appear to take on the coloring of a state microcosm, replete with tort immunity dating back to *Russell v. Men of Devon*,[1] where this state-oriented protection was extended for the first time to encompass municipalities. In contrast, however, the inclusion of corporate substance causes their hue to be altered dramatically to that of a non-governmental body which can only seek ineffectually the protective cover of this immunity. Historically, the common-law courts have endeavored to distinguish between these two classes of activity by denominating those functions within the former class as "governmental," "political," or "public" and those within the latter class as "corporate," "private," or "proprietary." But such is only a labeling process, while the vital task which these courts have sought to perform is to adequately determine the point at which one color begins to shade into the other—in short, the affixation of these labels to specific municipal activities to judicially determine the outcome of a myriad of lawsuits. Mississippi, like numerous other jurisdictions, in the absence of state legislative direction in this area has had to rely on the developing case law in seeking answers to the questions encountered in this fertile field of law. It is to a consideration of these problems and the solutions found thereto as pronounced by the courts of Mississippi that the following material is directed.

At a relatively early date it was determined that municipalities and counties in this state stood on quite a different footing respecting tort immunity.[2] In holding that there was no liability in the absence of statute for a county's neglect in maintaining a bridge which collapsed under the weight of plaintiff's decedent, his wagon and team, the Supreme Court of Mississippi declared:

> A county can have no liability except as authorized, expressly or by necessary implication, by some statute. Counties are political divisions of the State, created for convenience. They are not corporations with the right to sue and be sued as an incident to their being, but are *quasi-corporations*, invested by statutes with certain powers, and subject to certain liabilities, and can

[1] 100 Eng. Rep. 359 (1798).

[2] Braham v. Hinds County, 54 Miss. 363 (1877).

> neither sue nor be sued, except as authorized by statute. The right to maintain a suit like this against a county is not only outside the contemplation of the statutes, but is opposed by every consideration of sound policy.[3]

This position was underscored in a later case when the court noted that "the liability of a municipality . . . bears no analogy to the law applicable to counties. The responsibility of the two are distinct. . . ."[4] And even more specifically this differentiation was enunciated by the court in *Board of Supervisors of Lee County v. Payne* as follows:

> The principal ground upon which counties are not held liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. The theory upon which municipal corporations proper are held liable in such cases is that they are voluntary associations created and organized at the solicitation of, and with the free consent of, the inhabitants, under the laws of the state, and that the benefits accruing to the people by such incorporation compensate them for the liability. Another reason is that since the county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without the consent of the legislature. . . .[5]

Despite the absence of this absolute tort immunity enjoyed by the counties of the state, there are still areas of immunity which the municipality finds are every bit as advantageous to itself. The Mississippi courts have consistently held:

> In the establishment and regulation of schools, hospitals, poorhouses, fire departments, police departments, jails, workhouses and the construction of buildings for those purposes, municipalities act in their governmental, and not their private, capacity . . . .[6]

and as such are not liable for torts arising from these types of activities. While this policy has been extended to include municipal immunity where a prisoner who, while manacled, was injured while working off a sentence as part of a city street repair crew, his work being categorized as incidental to the jail sentence,[7] and where the driver of a fire engine was injured by the negligence of the fire chief in maintaining a defective shed for the temporary storing of the fire engine,[8] some inroads have

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[3] *Id.* at 364.

[4] Reddit v. Wall, 55 So. 45, 46 (Miss. 1911).

[5] 175 Miss. 12, 23, 166 So. 332, 335 (1936) *quoting* 7 R.C.L. § 29, at 955-56.

[6] Jones v. City of Amory, 184 Miss. 161, 167, 185 So. 237, 238 (1939).

[7] Warren v. Town of Booneville, 151 Miss. 457, 118 So. 290 (1928).

[8] City of Hattiesburg v. Geigor, 118 Miss. 676, 79 So. 846 (1918).

been made albeit precious few.[9] Generally, municipal immunity in these classes of cases is complete.

Perhaps the most prolific source of municipal tort liability case law involves the construction, maintenance and repair of streets. It has been held that a municipal corporation will be liable for the negligent grading of a street, when injury results, even though it appeared to be in a reasonably safe condition at the time of the grading.[10] In the landmark case of *Byrnes v. City of Jackson*,[11] the Mississippi Supreme Court recognized that:

> [T]he line of demarcation between the exercise of governmental functions and corporate functions is not clearly marked out in the authorities, and it is not an easy matter to deduce from the authorities the true rule of demarcation between the two functions.[12]

However, the court noted that the New York rule imputes liability for negligence in the area of streets and roads in that the municipality is exercising its corporate functions in such cases, and that Mississippi follows the New York rule insofar as liability for negligence in keeping the streets in repair is concerned, citing the prior case of *Whitfield v. City of Meridian*.[13] But, in order for the municipality to be liable for injuries resulting from defects in its streets, it must first be negligent and have notice of such defects.[14] This element of notice, and the fact that such notice could be actual, constructive or implied, was related in an earlier case in which a water tank, which was maintained in a defective condition by a city in its public street, collapsed killing a pedestrian. In holding the city liable, the court said:

> We do not dissent from the elementary principle, that before the municipality can be held liable for injuries resulting from nuisances or defects in its streets, it must have knowledge of the nuisance or the defect, and its danger. Notice there must be to charge the municipality, but this notice may be actual or constructive or implied. When the obstruction is created by the city itself, or where it permits an obstruction erected by another in its streets, it must take notice of such defects in the obstruction as ordinary care will discover. The structure in a street, to every part of which the entire public has the right of free access,

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[9] It would seem that tort immunity as respects the operation of school buses has been abrogated by the adoption of legislation, although the amount of damages recoverable will be limited within certain classes of cases. MISS. CODE ANN. § 6336-19 (Supp. 1968).

[10] City of Vicksburg v. McLain, 67 Miss. 4, 6 So. 774 (1889).

[11] 140 Miss. 656, 105 So. 861 (1925).

[12] *Id.* at 669, 105 So. at 863.

[13] 66 Miss. 570, 6 So. 244 (1889).

[14] Saxon v. Town of Houlka, 107 Miss. 161, 65 So. 124 (1914).

> must be erected in such manner and from such materials as to be reasonably safe; and it must be kept in this safe condition. Proper repairs, from time to time, are as much the duty of the city as a safe structure originally. Inseparably connected with this statement is another, viz., that a municipality is liable for injury resulting from its defective structures where, by reasonable diligence, it might have acquired knowledge of such defect. The common knowledge of mankind is chargeable to a municipality, also. The knowledge of the action of the elements on structures of wood, and of the liability of timber to decay under certain conditions, is to be attributed to municipalities, just as to natural persons. The duty of the municipality to exercise ordinary care to detect such natural decay, and to guard against injuries therefrom, follows necessarily.[15]

And the factors which may be considered by the jury in determining the question of fact as to whether or not the city had constructive notice, especially the length of time involved, have been spelled out in detail.[16] The tendency of the courts to continue to hold municipalities liable as a matter of law in cases involving defects from the elements in the course of time[17] has, however, been tempered with an explanation that in a proper case a municipality is not chargeable with notice of a partly concealed defect caused by time and the elements.[18] Thus it would appear that while a city is not considered to be an insurer of the safety of its streets,[19] a user may assume that the streets are reasonably safe, even though a traveler on the street is not entitled to have the use of the entire street right-of-way for travel.[20] But the municipality is not required to keep the entire width of its streets open and safe for travel provided that the part which is set aside is wide enough for safety and convenience.[21] It should be noted that a city will be held liable for a defective condition in a street which causes injury, irrespective of the fact that this defective condition was caused by a private person, if the condition is permitted to exist by the city;[22] and, since the liability of a municipality is the same to children as to adults, this liability for negligence will not be excused even where the child is a trespasser.[23]

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[15] Nesbitt v. City of Greenville, 69 Miss. 22, 29, 10 So. 452 (1891).

[16] City of Greenville v. Middleton, 124 Miss. 310, 86 So. 804 (1921). *See also* City of Lumberton v. Schrader, 176 Miss. 272, 168 So. 77 (1936).

[17] City of Ruleville v. Grittman, 250 Miss. 842, 168 So. 2d 527 (1964).

[18] City of Meridian v. Raley, 238 Miss. 304, 118 So. 2d 342 (1960).

[19] Gulfport & Miss. Traction Co. v. Manuel, 123 Miss. 266, 85 So. 308 (1902).

[20] Vines v. Southwestern Miss. Elec. Power Ass'n, 241 Miss. 120, 129 So. 2d 396 (1961).

[21] McComb City v. Hayman, 124 Miss. 525, 87 So. 11 (1921).

[22] City of Jackson v. Clark, 152 Miss. 731, 118 So. 350 (1928).

[23] McComb City v. Hayman, *supra* note 21.

However, this liability is extinguished when the injury occurs beyond the corporate boundaries.[24]

A closely associated problem is encountered with respect to obstacles and obstructions in municipal streets. Normally, the city will be held liable where negligence is found to exist whether such obstacle or obstruction is placed in the street by the city itself or whether it expressly or impliedly permits some private party to place it there.[25] A case in point[26] involved the driver of an automobile who was injured when his vehicle struck a "bumper" placed in a city street by city authorities for the purpose of warning automobile drivers of the danger of a street intersection. In holding the city liable, the court stated that the method of injuring one person in order to prevent danger to another person is wrong in principle; and such a regulation is not reasonable for the public safety as is warranted under the law, but is negligence. In refuting the city's claim that the driver of the automobile should have been aware of the obstacle by the maintenance of a proper visual observance, the court commented that "[t]he driver may assume the street is reasonably safe for travel, and is not required to use extraordinary care."[27] This same duty to exercise reasonable care to keep the municipality's streets reasonably safe for persons exercising reasonable care was thereafter extended to produce liability where the injury occurred on a "neutral" strip, normally used for parking, between the hard-surfaced street and the sidewalk.[28] This same duty was further extended, this time almost to the breaking point, when a plaintiff was allowed to recover for injuries sustained when she broke her ankle in a fall which she attributed to the city's negligent maintenance of a bridge over a ditch by a pathway, even though the city had built the bridge for the purpose of enabling city employees to move their mowing machines across the ditch and not for the purpose of inviting public use.[29] Thus, the court was holding *inter alia* that it chose to reaffirm an earlier holding that a city will be liable for the maintenance and repair of a privately built bridge if the use of the bridge is sufficiently public.[30]

Such problem situations also may involve more subtle twists. For example, what rule pertains when the city street, on which an injury

[24] Logan v. City of Clarksdale, 240 Miss. 716, 128 So. 2d 537 (1961), where a workman employed by the city to apply asphalt to its streets was injured while working on a road outside the city limits and recovery from the city was denied.

[25] Nesbitt v. City of Greenville, *supra* note 15.

[26] Mayor & Aldermen of City of Vicksburg v. Harralson, 136 Miss. 872, 101 So. 713 (1924).

[27] *Id.* at 884, 101 So. at 715.

[28] Birdsong v. City of Clarksdale, 191 Miss. 532, 3 So. 2d 827 (1941).

[29] City of Laurel v. Hutto, 220 Miss. 253, 70 So. 2d 605 (1954).

[30] City of Meridian v. Peterson, 132 Miss. 7, 95 So. 625 (1923).

took place due to negligent maintenance or repair, happens also to be a part of the state highway system? In *City of Laurel v. Upton*[31] the court, in its opinion, quoted MISS. CODE § 8037 (B) (1956), which provides:

> On any municipal streets or parts of sections thereof taken over for regular maintenance and maintained by the state highway department as a part of the state highway system the municipality shall not be liable for negligence occasioned by the maintenance or repair of such streets so thus apportioned to and of such width as is maintained by the state highway department. . . .

However, the same court was careful to point out that, while it was clear that all this section does is to relieve the city from any liability because of negligence occasioned by the repair and maintenance of a street maintained by the highway department, it does not relieve the city of its negligence in causing an excavation or ditch to be opened and maintained in a dangerous condition at a place that extends into that part of the street being maintained by the highway department. And this is true notwithstanding the fact that such ditch was opened in the process of the city relocating its water and sewerage lines at the insistance of the state and federal governments.

Intimately interwoven with this problem of a city's liability in tort as respects the repair and maintenance of its streets in that situation wherein the city, while either constructing, maintaining or repairing its streets, has supposedly breached some duty of due care to an abutting property owner. A municipality may be liable to abutting property owners for damage resulting from any additional servitude placed on the property by any such use not incidental or necessary to its use by the public.[32] So also, the municipality may be held liable for damages inflicted on abutting property by the improper use of streets in providing drains.[33] But, it would seem that the municipal corporation has no duty to provide a means of access from private property to its streets, nor is it liable for failure to guard its streets from approach at points where such approach is dangerous. Such was the holding in a case where the plaintiff was injured by falling into a "cut" made during the construction of a new highway near plaintiff's residence and the defendant city was held not to have had to foresee every possible eventuality, but only those which were reasonably foreseeable that someone would continue to use the old pathway, which was without a barrier, and thus be injured thereby for actionable negli-

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[31] 253 Miss. 380, 396, 175 So. 2d 621, 626 (1965).

[32] City of Laurel v. Hearn, 143 Miss. 201, 108 So. 491 (1926).

[33] *Id.*

gence to lie.[34] In reversing a prior judgment for the plaintiff, the court quoted the leading case of *Metcalf v. Boston*:[35]

> Municipalities are not required at the expense of the taxpayers to provide special means of approach or access to its streets opposite the residence of every abutting property owner. Such individual entrances must be provided and constructed by the owner himself.

One further consideration is worthy of note pertaining to the subject of a municipality's streets. This is the litigation that has arisen from the construction, maintenance and repair of drains, sewers and storm sewers. As alluded to above,[36] municipalities will be held liable in their "corporate capacity" for the construction and maintenance of these street incidentals,[37] even to the point where a municipality compels connection with a sewerage system, although the system did not belong to the municipality and injury resulted.[38] So too, the city will be held liable where its negligence in not properly maintaining storm drains causes such drains to become clogged and the resultant flood causes damage to private property.[39] But, while the municipality may be liable for damage caused by its negligence in the operation and maintenance of sewers and drains under its control, it is not liable for damage caused by an overflow from extraordinary or unprecedented rains or floods, reasonably unforeseeable.[40] The courts have also used the "corporate capacity peg" on which to hang a holding of actionable negligence where a child was injured by falling into an uncovered drainage ditch, full of debris, which was located in close proximity to a public school.[41] The holding emphasizes that a city has the duty to exercise reasonable care to maintain its streets in a reasonably safe condition for use by persons exercising reasonable care. This element of reasonable care is again hammered home in a case in which the plaintiff suffered injury as the result of the defectiveness of an iron grating which covered a water drain in a street.[42] In stating that the defect in question should have been apparent to the city, and as such would constitute actionable negligence, the court, in referring to a prior holding,[43] mentions the "doctrine of trivial defect" saying:

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[34] Shuptrine v. Herron, 182 Miss. 315, 180 So. 621 (1938).
[35] 158 Mass. 284, 285, 33 N.E. 586 (1893).
[36] City of Laurel v. Hearn, *supra* note 32.
[37] Semple v. Mayor & Aldermen of Vicksburg, 62 Miss. 63 (1884).
[38] Thompson v. City of Winona, 96 Miss. 591, 51 So. 129 (1910).
[39] City of Meridian v. Bryant, 232 Miss. 892, 100 So. 2d 860 (1958).
[40] Hawkins v. City of Natchez, 242 Miss. 91, 133 So. 2d 610 (1961).
[41] Shows v. City of Hattiesburg, 231 Miss. 648, 97 So. 2d 366 (1957).
[42] City of Cleveland v. Threadgill, 246 Miss. 23, 148 So. 2d 670 (1963).
[43] City of Greenville v. Laury, 172 Miss. 118, 159 So. 121 (1935).

> This doctrine simply means that where a defect in a sidewalk or street is so trival as not to meet the test of foreseeability—that is to say, such defect could not have been reasonably anticipated to cause injury—the question of negligence is not submitted to the jury, and the courts hold as a matter of law that there was no negligence on the part of the municipality in permitting it to exist.[44]

However, this doctrine is not made a part of the majority opinion, being merely referred to in the concurring opinion of one justice, and it is therefore arguable that this doctrine does not control in Mississippi. There are no other cases mentioning the point. Lastly, it has been held that a city is liable for any special and different damage suffered, not common to the general public, caused by the construction and maintenance of its sewerage system, whether properly constructed and maintained or not, thus hinting at strict liability in some classes of cases.[45]

Not far distant, literally or figuratively, from the problem of streets is that of sidewalks and the municipalities' tortious liability in negligence therefor. Out of innumerable tomes of litigation in this area a set of general rules has emerged which will govern in most instances. For the most part, cities will be held liable for injury to pedestrians when the proximate cause of such injury was a defect attributable to the negligent maintenance of such sidewalk and where the city had actual or constructive notice thereof. So deeply imbedded in the decisions is this proposition that the municipality will be hard-put to argue *contra*. In fact an extension of this holding imposes liability on the city where pedestrians are injured while traversing land owned by the city and leased to a private corporation which in turn sub-leased to a private operator.[46] Here, a large portion of the city's population was accustomed to "cutting across" the service station property enroute to the business section of the city due to the fact that no sidewalks were provided. Since the practice had continued for such a long period of time, the court held that the injured plaintiff was a member of a class of implied licensees to whom the city owed a duty to take the necessary steps to do away with the danger along the way which, in all probability, would ultimately cause injury. When the duty was breached and injury resulted (plaintiff falling into an uncovered grease pit) liability ensued. Also, the court has found liability where the injury has been caused by the negligent maintenance of a structure which overhung the sidewalk. In this respect, the Supreme Court of Mississippi has allowed recovery under the Wrongful Death Statute[47] where plaintiff's decedent

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[44] City of Cleveland v. Threadgill, *supra* note 42, at 31, 148 So. 2d at 673.

[45] Thompson v. City of Philadelphia, 180 Miss. 190, 177 So. 39 (1937).

[46] Standard Oil Co. v. Decell, 175 Miss. 251, 166 So. 379 (1936).

[47] MISS. CODE ANN. § 1453 (Supp. 1968).

was killed as a result of a canopy or shed over a sidewalk falling and crushing him.[48] The case is again hung on the "peg" of a city's responsibility to exercise reasonable care in the maintenance of its sidewalks. But the municipality, under this standard of reasonableness, will not be liable in every instance. For example, where the pedestrian sees or is otherwise cognizant or aware of a defect, and the resultant injury is attributable to the pedestrian's miscalculation in trying to avoid the defect, the city will be absolved of liability.[49]

Trees, although normally considered innocuous, have also been the subject of much municipal litigation. Generally, it is ". . . not the duty of a municipality to have a regular or continued inspection of the trees which are allowed to remain to beautify the street. . . ."[50] and as such the municipality may be found blameless in cases where the defective condition, which was the proximate cause of an injury, was unknown.[51] The court also stated:

> [The] duty of a municipality to exercise reasonable care to ward against defects from overhead as well as underfoot exists. The danger may be as great from overhead as from underfoot, and it would be charged with that degree of care commensurate with the danger and risk as to trees which are permitted in the neutral ground between the sidewalk and the street and in a proper case it would be liable for damages ensuing to a pedestrian struck by a limb which had been negligently allowed to remain in a tree for such length of time as to evince want of ordinary care relative thereto.[52]

In this respect the groundwork was thus established for a later case where municipal liability was found when automobile occupants sustained injury when the automobile in which they were riding on a public street was crushed by a falling decayed tree that had been growing on property abutting the highway, the limbs of which overhung the pavement.[53] Reasonable care again seemed to be the focal point of judicial rationale. Further, it is deemed worthy of note that despite the fact that while a municipality may trim shade trees between the street and the sidewalk,

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[48] City of Corinth v. Gilmore, 236 Miss. 296, 110 So. 2d 606 (1959).

[49] Rowe v. City of Winona, 248 Miss. 411, 159 So. 2d 282 (1964).

[50] Warren v. City of Tupelo, 187 Miss. 816, 825, 194 So. 293, 295 (1940).

[51] *Id.* at 825, 194 So. at 295. In this case the city was found to be not liable for injury to a lessee who, while standing in front of his shop, was struck by a falling limb from a tree which stood between the sidewalk and the street. The limb showed no outward sign of being in a dangerous condition and had not been allowed to remain on the tree for so long as to constitute negligence due to want of ordinary care.

[52] *Id.* at 824, 194 So. at 295.

[53] Barron v. City of Natchez, 229 Miss. 276, 90 So. 2d 673 (1956).

or even remove them entirely without being liable, if the action is not necessary, liability will attach.[54]

As might well be imagined city-owned utility services have had more than their fair share of litigation headaches. Municipal electric and electric light plants have consistently been held liable for negligently causing injury[55] as have municipal water supply systems.[56] Concerning the latter, this was so irrespective of whether it was the failure to remove an obstruction from a water connection within a reasonable time,[57] or whether the flow of water was insufficient.[58] However, a city water company was not held liable for the destruction of property by fire because of its failure to maintain a designated water pressure.[59] The same result is reached even if the city water company was negligent in permitting the fire hydrants to become defective; the fact that the municipality used the same reservoir and pipes for its fire service that it employed for distribution of a public supply for domestic purposes, from which it derived a profit, made no difference as to liability.[60] On the other hand the collection and disposal of refuse, while not normally considered to be within the realm of municipal utility services, is nonetheless treated similarly by the courts in tort cases. It was held quite early that garbage collection was a proprietary function, and as such the city would be held liable even where the injury complained of was caused by the collecting vehicle.[61] This determination has been reaffirmed more recently where, in addition to specifying that the function of trash and dirt collection and disposal was corporate or private, the court held the negligent maintenance of a city dump to be a nuisance.[62] But liability did not attach where the scavenger was an independent contractor who was trespassing and the city authorities knew of the trespassing and had undertaken to stop it;[63] or where an independent contractor was negligent in the cleaning of a cesspool, which resulted in injury, and the city inspector had approved the completed work.[64]

As municipalities progressed from merely providing services of a utilitarian nature for its inhabitants to those of a more recreational

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[54] Town of Durant v. Castleberry, 106 Miss. 699, 64 So. 657 (1914).

[55] Laurel Light & Ry. Co. v. Jones, 137 Miss. 143, 102 So. 1 (1924).

[56] Woods v. Town of Indianola, 114 Miss. 722, 75 So. 549 (1917).

[57] Brown v. City of Meridian, 102 Miss. 384, 59 So. 795 (1913).

[58] Van Norman v. Meridian Waterworks Co., 102 Miss. 736, 59 So. 883 (1912).

[59] Wilkinson v. Light, Heat, and Water Co. of Jackson, 78 Miss. 389, 28 So. 877 (1900).

[60] City of Columbus v. McIlwain, 205 Miss. 473, 38 So. 2d 921 (1949).

[61] City of Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329 (1911).

[62] City of West Point v. Meadows, 236 Miss. 394, 110 So. 2d 372 (1959).

[63] City of Laurel v. Ingram, 148 Miss. 774, 114 So. 881 (1928).

[64] City of Gulfport v. Sheppard, 116 Miss. 439, 77 So. 193 (1917).

nature, it was found that tort liability persisted in tagging close behind. The first case of real magnitude, *Byrnes v. City of Jackson*,[65] involved a woman who was mauled by a bear in a municipal zoo. After first determining that the liability for municipal negligence as respects parks is probably best considered to be on the same plane as that of a city's liability for negligence in maintaining its streets, the court proceeded to reason that, while there was no specific statute giving the city the power to operate a zoo and to keep ferocious and dangerous animals therein, such power was implied from the grant of power to maintain parks. Therefore if a city maintained and operated a zoo, this was not *ultra vires* and the city would be liable if its negligence was the proximate cause of injury. While relying on the traditional "corporate" and "proprietary" labels to find liability, here obviously because of the fact that the injured plaintiff had gained entrance to the zoo by buying a ticket, the court suggests the necessity of a city exercising a high degree of care to make its parks reasonably safe places to which people may resort and even hints at absolute or strict liability under certain circumstances.

The doctrine announced in *Byrnes* was extended some twelve years later when a city was held liable for injuries sustained by a paying spectator at a football game.[66] The proximate cause of the injury was the city's negligent maintenance of a seat in the municipal stadium which gave way during the game occasioning plaintiff's fall. Again striking down the *ultra vires* contention of the defense, the court found plaintiff to be one of a class of implied invitees to whom the city held out the stadium as a safe place in which to sit. And thus liability attached even though the spectator purchased a ticket for a seat in a different part of the stadium from that which he occupied when the injury was sustained, and even though he was pulled down by another spectator who sought to keep himself from falling. Again, the purchase of a ticket by plaintiff played no little part in the rationale of the "proprietary function" holding.

The last extension of the doctrine was cemented into place when a recovery against the city for its negligence was allowed when plaintiff's intestate was killed as a result of falling bleachers while in search of a vacant seat in the proximity of a ball game.[67] Here, no admission was charged although the "proprietary" fixation remained more deeply entrenched than ever before. It has been ultimately seized upon to allow recovery to injured plaintiffs in a variety of municipal environments

[65] Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925).
[66] City of Jackson v. McFadden, 181 Miss. 1, 177 So. 755 (1937).
[67] Harlee v. City of Gulfport, 120 F.2d 41 (5th Cir. 1941).

from airports,[68] through park swimming pools[69] and finally on piers[70] with the projected certainty that it will eventually come full cycle back to zoos again.

One final area of municipal tort liability requires examination, that area being circumscribed by the term "nuisance." Just as individuals and private corporations may be found tortiously liable for the creation and maintenance of a condition which causes injury, inconvenience or obstruction, so may municipal corporations be held liable for acts or omissions which cause interference with the use and enjoyment of land as respects individuals, and for interferences with the public health, safety, morals or welfare. Concededly, an almost inestimable number of acts or omissions could be imagined which would come within this category, and as municipalities are pressed harder by their residents for the establishment and continuation of service functions, the chances that byproducts of these services may cause sufficient harm to be judicially deemed a nuisance become very real indeed. As the law stands today in this state a municipality will be held liable if it negligently creates or maintains a nuisance which causes injury and the required notice, either actual or constructive, is present[71] and this is so despite the fact that the nuisance is the result of an action precipitated by a duly enacted city ordinance.[72] However, the doctrine of "attractive nuisance" is not followed by the Mississippi courts and thus a plaintiff's recovery will be precluded in some specific instances.[73]

It should be startlingly apparent that the courts of Mississippi have in the main refused to depart from that ancient battlefield, the "governmental-proprietary" dichotomy when considering factual situations in legal contests where municipal tort liability is in issue. Inevitably the victor which emerges is the label—be he "governmental," "political," "public," "corporate," "private" or "proprietary"—and he continues to reappear after each encounter with his armor evidencing a bright new judicial gloss. To be sure, precedent is that stuff from which legal continuity is made, but must it be also the tether which restricts progress? As municipal corporations engage in activities of ever-increasing magnitude and complexity, the courts will assuredly find it yet more difficult to fit the label to the activity and conversely to fit the activity to the label. A more realistic approach, it is urged, would be for the courts to come out from behind the facade of the labels and render opinions

[68] Brummett v. City of Jackson, 211 Miss. 116, 51 So. 2d 52 (1951).
[69] City of Columbia v. Wilks, 166 So. 925 (Miss. 1936).
[70] Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967).
[71] City of Vicksburg v. Richardson, 90 Miss. 1, 42 So. 234 (1907).
[72] Crawford v. Town of D'Lo, 119 Miss. 28, 80 So. 377 (1919).
[73] McGill v. City of Laurel, 252 Miss. 740, 173 So. 2d 892 (1965).

founded on more solid footing. This being done, it might even be found that when the activities of municipal corporations are considered against the background of contemporary urban life many of the reasons for municipal tort immunity may disappear entirely.

II. A Case in Point:

Mississippi Baptist Hospital v. Holmes[74]

From the foregoing section it is at once evident that in the main the sole vestiges of municipal tort immunity in Mississippi repose within the limited field embracing the establishment and regulation of schools, hospitals, poorhouses, fire departments, police departments, jails, workhouses and the construction of buildings for those purposes—in short, those areas of municipal activity which, when taken together, comprise a goodly proportion of those services which municipal inhabitants expect to be furnished them as an incident of municipal citizenship. While the courts of Mississippi have sought to maintain these areas inviolable, there has been decided at least one case which, although grounded on a different factual context from municipal tort immunity, nonetheless provides ample argumentative ammunition for the abrogation of this immunity.

Holmes involved the death of Mrs. George R. Holmes in the Mississippi Baptist Hospital, a charitable institution. The widower and the children of Mrs. Holmes brought suit against the Mississippi Baptist Hospital and one of its laboratory technicians and recovered $25,000.00 in the trial court. The jury found that on the night before Mrs. Holmes' operation, the technician had mislabeled blood that was to be used in connection with a blood transfusion for Mrs. Holmes during her operation. The blood was so used the next morning during her scheduled surgery, and she died approximately twenty-four hours later. At the trial, it was brought out that 500 c.c. or less of Type "2" blood, the mislabeled blood, given to a Type "4" patient, as was Mrs. Holmes, would be extremely dangerous and probably fatal, unless the grave condition produced thereby could be quickly corrected. Mrs. Holmes was given 700 c.c. of Type "2" blood before the error was discovered. Only the Mississippi Baptist Hospital appealed from the lower court's decision. The supreme court affirmed.

Because *Holmes* overrules the earlier charitable immunity doctrine and presents a thorough discussion of the issues involved, such issues being comparable to those involved in any argument espousing the abrogation of municipal tort liability; it provides a singular vehicle for such

[74] 214 Miss. 906, 55 So. 2d 142, (1951), *suggestion of error overruled*, 214 Miss. 940, 56 So. 2d 709 (1952).

scrutinization as would best bring to light those factors which could herald the final demise of such immunity. The purpose of this extended examination is to point out these similarities and to show that the reasons for overruling charitable immunity are basically the same as those for overruling municipal immunity in the field of tort liability. More simply, if the courts are willing to take one step forward by overruling charitable immunity, taking two steps forward to overrule municipal immunity should not seem repugnant.

Three issues were raised on the appeal of *Holmes*, first:

> Whether or not the corporate defendant hospital was negligent either in failing to exercise reasonable care in the selection and employment of this laboratory technician or in retaining him in its employ under the facts and circumstances alleged to have been known . . . by the exercise of reasonable care, prior to his having correctly typed and accurately cross-matched the blood of the two patients hereinbefore but which he negligently mislabeled as aforesaid . . . .[75]

The court concluded that there was no way for the hospital to have known that the technician would be negligent by examining his past record. The hospital was, therefore, not negligent in hiring him or keeping him in its employ, as he had previously performed his duties well. It appeared that the technician had served in the hospital corps of the United States Navy for a considerable amount of time and that he had come highly recommended by the chief pathologist and director of the laboratory at the United States Veterans Administration Hospitals of Gulfport and Biloxi, Mississippi. The issue was, thus, dismissed.

The second issue faced by the court:

> [W]hether or not, while acting through this technician as its agent and employee, the hospital was negligent in permitting the samples of the blood of the deceased to become mixed and confused with that of another person, because of the mislabeling of the same, so as to result in the wrong type of blood being used and causing the death of this patient, thereby rendering the hospital liable in damages, notwithstanding that its managing officers and agents and its board of trustees may have exercised reasonable care in the selection, employment, and retention of the said employee in its service . . . .[76]

The court agreed with the jury that the technician was negligent in mislabeling the blood and that his act was the proximate, or a contributing, cause of the death of Mrs. Holmes. It appeared that the technician had been told to type the blood of Mrs. Holmes, which he did correctly.

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[75] *Id.* at 914, 55 So. 2d at 144.

[76] *Id.* at 914, 55 So. 2d at 144.

Then he was told to type the blood of a Mrs. Holder, which he did correctly, the types being "4" and "2" respectively. He then prepared blood to be used in transfusions for the two women. It was then that he mislabeled the blood. In view of the technician's specialized knowledge and training and that he knew the dangers of giving a transfusion of the wrong blood type, he was guilty of negligence. The jury had found that the transfusion of the mislabeled blood was the proximate cause of Mrs. Holmes' death, and the court agreed.

This led to the consideration of the third and, for the purposes of this analysis, the most important issue in the case:

> Assuming that there was no failure to exercise reasonable care in the selection, employment or retention of the said employee, but that nevertheless the death of this patient was proximately caused by his negligent act while engaged in the duties and acting within the scope of his employment, then whether or not the hospital would be relieved of liability for his negligence on the ground that it is chartered and operated as a charitable institution which has never issued any stock, has paid no profit or dividends to any of its incorporators or its owner, the Mississippi State Baptist Convention, and has at all times devoted its entire income and revenues from every source to the payment of the expenses of its operation, including the compensation to its employees, the expansion of its facilities in the erection and maintenance of the buildings, and the furnishing of new equipment for carrying on its work of benevolence and charity in connection with its function as a general hospital, the charter of which provides that it may charge and collect fees and compensation from all persons, and for all services rendered, and may do charitable work.[77]

If the above quoted issue were to be framed in terms of municipalities, the writers suggest that very little wordage would have to be changed to have the court face squarely the issue of municipal tort immunity. A municipal corporation does not charge and collect fees from its taxpayers, but it does receive the majority of its capital from taxes levied upon and collected from the taxpayers living within the municipal boundaries. Funds acquired by a municipality are devoted entirely—much the same as those of charitable institutions—to the payment of operating expenses and to the payment of employees' wages and to the payment of expenses incurred in the erection and maintenance of municipal buildings and, further, to the payment of expenses incurred in the procurement of new equipment. Charitable institutions are built and maintained so that the poverty-stricken elements of society may receive better and more adequate care. But when a person pays for the services rendered by a charitable institution, that institution acquires an

[77] *Id.* at 914-15, 55 So. 2d at 144.

increased duty of care and responsibility toward that individual. So, too, a municipal corporation should acquire this duty when it provides services, i.e., fire protection, to one of its taxpayers. The taxpayer is paying for that service via taxes levied upon him and his property just the same as a pay patient is paying for the services rendered him by a charitable hospital.

The court was thus then faced with the ultimate issue of whether or not the hospital was liable in damages for the negligent act of its employee despite the fact that it exercised reasonable care in the selection, employment, and retention of that employee. The "rule" creating this immunity of charitable organizations from liability for the negligent acts of its employees "is itself an exception to the general principles of liability."[78] So, too, is the immunity enjoyed by municipalities an exception to those same general principles. In courts not bound by earlier precedents, it has been shown, ". . . that most, if not all, of the theories upon which the doctrine of immunity has been created by the courts . . . are wholly illogical and inconsistent with the reasons given therefor."[79] The court took judicial notice of treatises and law journal articles which have consistently voiced objection to the application of a doctrine of immunity to charitable organizations. Astute writers have also objected to the immunity enjoyed by the municipalities, about which Prosser says:

> Virtually all writers have agreed that no one of these reasons for denying liability is sound, and all of them can be found to have been rejected at one time or another in the decided cases. The current of criticism has been that it is better that the losses due to tortious conduct should fall upon the municipality rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public. Whether as a result of this criticism or not, there has been a marked and steady trend in the direction of an extension of municipal tort liability, either by finding that the particular activity of the defendant is not a "governmental" one, or by discovering special reasons to take it out of the general rule. For many years, however, the courts were so far bound and hogtied by precedent and existing classifications, that it appeared that any real reform of the law must come by statutes. It is only quite recently that any general movement for alteration of the common law has been initiated.[80]

Even though there might have been a need for this municipal tort

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[78] *Id.* at 930, 55 So. 2d at 151.

[79] *Id.* at 930, 55 So. 2d at 152.

[80] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1004-05 (3d ed. 1964).

immunity at one time, that time has long since faded into antiquity. With reference to charitable institutions the court recognizes this fact:

> In response to what appeared good as a matter of public policy at an early date, many of the courts have created an immunity, which, under all legal theories, is basically unsound, and especially so, when the reason upon which it was founded no longer exists.[81]

Concededly, the maintaining of an immunity doctrine might have been a necessity for municipalital existence and survival in the past, but the bases of that immunity are no longer valid. The court in *Holmes* considered and rejected the bases for charitable immunity, which are comparable to the bases of immunity as respects municipalities, first:

> The foundation of this immunity doctrine in favor of charitable institutions is based (1) upon the ground that the payment of damages for an injury caused by the employee of such an institution would divert the trust funds thereof from the purposes for which the institution was established and would discourage future donations to the same if the contributions are devoted to a purpose other than that intended by the donors . . . .[82]

In order to discount this basis for charitable immunity, the court relied partly on the fact that when pay patients are involved, a profit is made on the services rendered to them, and partly on the fact that third persons other than patients are allowed to recover damages from the institution concerned for injuries received through the negligence of employees of the charitable institution. The negligence of employees of a municipality also results, in a few cases, in liability of the municipality. The creation and/or maintenance of nuisances[83] and faulty maintenance of public roads[84] are two instances where the liability of the municipality exists. But there are a great many instances in which a "proprietary" function does not exist.[85] The court-created distinction between the "proprietary" functions and "governmental" functions of a municipal corporation persists as an anomaly in the law. A municipality is a corporate entity that was created to serve the people situated within its boundaries. Of course, there is power to govern the community, but that same power is exercised through acts that are similar, if not identical in most instances, to acts that are in the realm of private corporations. It is well known that private corporations are constantly held

[81] Mississippi Baptist Hospital v. Holmes, *supra* note 74, at 931, 55 So. 2d at 152.
[82] *Id.*
[83] City of Vicksburg v. Richardson, *supra* note 71.
[84] Whitfield v. City of Meridian, *supra* note 13.
[85] Jones v. City of Amory, *supra* note 6.

liable for negligent torts mainly because their services are rendered to a paying clientele. A municipality is a corporation operated by a small centrally located group to serve the communal needs of the citizenry as a whole, and it is financed by that entire latter group. It only stands to reason the taxpayers involved should be protected from the tortious acts of the municipality to much the same extent as they would be protected from a private service corporation since ostensibly the municipality exists for the benefit of the inhabitants and not vice versa. Although no actual profit is made from a taxpayer, it is felt that it is only reasonable that a municipality be held liable when it, through its employee, injures one who supports it by paying taxes. Municipalities are corporate entities as are most private enterprises. The only difference is that municipalities have certain limited judicially announced "governmental" functions, which allow them to be shielded by an immunity not enjoyed by other corporations.

Secondly, the court observed that charitable institutions' tort immunity "wrongfully extends the doctrine of respondeat superior to embrace corporations engaged in business not operated for profit . . . ."[86] The "*existence* of" and "*availability* of" liability insurance are emphasized by the court as a "persuasive argument in favor of applying the general law on the subject of negligence in suits against charitable institutions which derive the larger portion of their *earnings* from pay patients."[87] Liability insurance is also available to municipalities. It can be expensive, but if liability were generally recognized, the demand for liability insurance for municipalities would increase and the premiums would probably go down. A municipality can also be said to derive its earnings from taxpayers, if earnings are connoted with taxes. Profits are a private corporation's reason for being in existence. The individuals who own shares in such a corporation have as their objective making profits. Municipal corporations have as their reason for being in existence service to the taxpayers. Comparatively, the taxpayers do not have as their objective making profits but instead an adequate and efficient amount of service. Although the end result of the two types of corporations is not exactly the same, the result obtained is the result intended, except that the taxpayer has no protection from inadequate service due to the court-imposed immunity doctrine. As to the interrelationship of liability insurance and the doctrine of respondeat superior, the court stated:

> [There is no] logical reason why the doctrine of respondeat superior should be applied to the negligent acts of the servants of

[86] Mississippi Baptist Hospital v. Holmes, *supra* note 74, at 931-32, 55 So. 2d at 152.

[87] *Id.* at 934, 55 So. 2d at 154.

> corporations engaged in other commercial enterprises and at the same time be held inapplicable as to the negligent acts of charitable institutions which are now operating in the field of big business and on a large scale. There is no need for the application of either of those grounds of the immunity doctrine where liability insurance is available to such latter institutions the same as to the former to protect themselves from the diversion of their earnings to the payment of judgments for damages recovered against them, and especially where the premiums for such insurance can be paid as an item of the cost of operation without unduly impairing their earnings for use in the operation of their business.[88]

Municipalities have so expanded in past years that they are now operating in the field of big business on a very large scale, i.e., a fire protection service and an educational service. As the needs of the people increase, invariably the municipality must expand its services. The writers feel that this expansion, in order to adequately serve the people, needs to incorporate an expanded municipal tort liability. The premiums for the necessary liability insurance would more than likely be negligible when compared with the overall municipal budget. While such premium payments would be a small investment in the protection of the taxpayer, they would greatly facilitate one of the primary reasons for establishing municipalities, that being the interaction of service and protection.

As a third basis on which to predicate tort immunity as respects charitable institutions, the court observed that ". . . by accepting the treatment received, a patient assumes the risk of negligence and impliedly agrees to waive liability for injury caused by the negligent acts of the employees of the charitable institution . . . ."[89] The court resolved this basis for charitable immunity rationalizing that a pay patient gives "full and adequate consideration for the accommodations and services . . . ."[90] that the hospital furnishes him with, and that, in view of the fact that mostly ill and/or injured people come to a hospital that cannot be fully conscious of their actions, the pay patient cannot be held to have assumed the risk of liability, especially where there is no consideration to support the waiver. Municipalities are somewhat different in this respect, since the taxpayer has no choice other than to accept whatever action the municipality takes and, thus, necessarily, under the present law, assumes the risk of negligence. When municipal corporations were first chartered there might have been a need to protect them from tort liability so that they would have a chance to succeed. In the beginning there might not have been enough money in the municipal

[88] *Id.* at 934, 55 So. 2d at 153.
[89] *Id.* at 932, 55 So. 2d at 152.
[90] *Id.* at 935, 55 So. 2d at 154.

treasury to pay a judgment; however, today insurance is available. As time has passed, the need to protect a struggling municipal corporate system has become comparatively inconsequential; while the need to protect the individual taxpayer has become paramount.

In discussing the fourth basis usually urged in upholding the doctrine of tort immunity for charitable institutions, the court reflected that "it would be better that the injured person, such as a patient at a charitable hospital, suffer his injury without recompense than that such hospital be required to pay the damages caused him through its negligence."[91] Under this theory of nonliability, the court said that a pay patient is being forced to donate what he might have recovered to charity, "whether he is willing to do so or not . . . ."; others then "receive charity while he suffers from an injury which has been negligently inflicted upon him."[92] Comparatively speaking, a person who is injured by an employee of a municipality is required to pay more taxes where the rule of nonliability exists. Thus, the individual taxpayer is forced to pay the entire amount for which the municipality rightfully should be liable. If the municipality were to live up to its obligations, the entire amount would be distributed among all the taxpayers in that municipality in the form of premium payments or liability insurance. The taxpayers were the original incorporators of the municipality and, thus, the owners of the municipal corporation. Since the liability insurance premium payments are an incidental cost of operation for almost all corporations, the taxpayers would only be contributing to the efficient management of their municipal corporation. Lastly, the court finds that immunity and neglect go hand in hand.

> [I]t should be said that the tendency of immunity is to foster neglect, and that the tendency of imposing liability is to induce care and caution in the treatment of those for whom these institutions were established. Neither the encouragement of charity and philanthrophy nor the doctrine of immunity on the ground of public policy can dispel the fact that the primary interest and welfare of the public requires that one person should not suffer an injury to his or her life or limb without recompense merely in order that all of the earnings of a charitable hospital should be devoted to the purpose of providing charity for others.[93]

The same thing can be said of municipalities. As it stands now, there is little or no incentive to do a good job. The only incentive is to do the job; the quality does not seem to be of great importance. Revoking the municipal tort immunity doctrine would place a greater burden of

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[91] *Id.* at 932, 55 So. 2d at 152.

[92] *Id.* at 936, 55 So. 2d at 154.

[93] *Id.* at 939, 55 So. 2d at 156.

responsibility upon the governing elements of a municipality and add a much needed incentive to provide excellent, as opposed to mediocre, service to the taxpayers. Therefore, by abolishing the outdated court-created doctrine of municipal tort immunity, two vital functions would be performed: first, the individual taxpayer would be protected from the negligent torts of municipal employees; and, second, the entire group of taxpayers would be benefited by more efficient and responsible service. It should be noted that increased efficiency in the operation of a municipal corporation would probably result in less expense; and that savings, when reduced by the required liability insurance premium payments, would create a new budget of approximately the same cost as the old one—the only difference being that the individual taxpayer is more fully protected.

III. Conclusion

From the outset, the writers have attempted to unmask the patent fallacy of the judiciary blindly labelling municipal corporate functions as either "governmental" or "private" as a condition precedent for adjudicating lawsuits involving municipal tort immunity. As the law peculiar to this area evolved and grew to almost full maturity, first one, and then another, of the activities indulged in by municipalities were admitted by the courts as being those which would result in liability if the requisite duty, breach, causation, injury, and freedom from fault on the part of the victim were shown to exist in each particular case. While it is true that in all these instances the courts have seized upon a "private" or "proprietary" label, it is submitted that the real reason for the finding of liability sat firmly upon a public policy which rightly recognized that these were particular types of actions wherein recovery against the municipality should be allowed. At present there are but a few sacrosanct activities which remain fully immune to actions by individuals who have been or may be injured by the negligent acts or omissions of a municipal corporation. It is hoped that the preceding analysis may aid in the long-overdue realization that there should be a public policy favoring recovery for all municipal torts and, as such, the antiquated rationale granting immunity to municipal corporations for their tortious acts should be replaced with a more modern outlook which fully considers desirable and available objectives and alternatives which are the real factors on which municipal tort immunity should or should not be predicated. This being done, the complete abrogation of municipal tort immunity should follow closely behind.

Alan E. Michel
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A TAX GUIDE FOR THE GENERAL PRACTITIONER: THE TAX CONSEQUENCES OF PARTNERSHIP FORMATION, CHANGE IN MEMBERSHIP, DISSOLUTION, AND TERMINATION

I. Introduction

A unique posture is assumed by a partnership for the purposes of federal income taxation under the Internal Revenue Code of 1954[1] which presented for the first time a detailed, integrated, and flexible structure for partnership taxation to remedy the universal uncertainty and vexatious disorder which had prevailed for the previous forty years. The objective of this Comment is directed toward, and its scope is restricted to, edifying the general practitioner of the tax consequences of the formation, the change in interests, and the termination of a partnership under the revised Code.

As compared with the substantive law of partnerships, substantially more forms of transacting business are embraced by the notably concise, though negatively couched, definition propounded by the Code. For taxation, a partnership includes:

> A syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not . . . a corporation or trust or estate.[2]
>
> Such an entity is created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is a community of interest in the profits and losses.[3]

This holds true even in instances where the relationship is invalid under applicable state law, the restrictions of which do not prevent partnership characterization for federal income taxation.[4] Membership in a partnership, not being limited to individuals, may consist of estates, trusts, or corporations.[5]

In determining whether or not a partnership exists, the courts have

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[1] Int. Rev. Code of 1954. Enacted August 16, 1954, superceding Supplement F of Int. Rev. Code of 1939, signed by President Eisenhower to become Public Law 591 of the Eighty-third Congress, and constituting Title 26 of the U.S. Code.

[2] Int. Rev. Code of 1954, § 761 (a); Int. Rev. Code of 1939, § 3797 (a) (2).

[3] Commissioner v. Culbertson, 337 U.S. 733, 740 (1949).

[4] Rev. Rul. 243, 1958-1 Cum. Bull. 255. *See* Aldrich v. Usry, 211 F. Supp. 330 (E.D. La. 1962); Ralph M. Shaffer, 4 P-H Tax Ct. Mem. 830 (1945) (partnership engaged in illegal business under state law, but recognized for federal tax purposes).

[5] Isaac W. Frank Trust, I.T. 2749, XIII-1 Cum. Bull. 99 (1934); *cf.* Rota-Cone Oil Field Operating Co. v. Commissioner, 171 F.2d 219 (10th Cir. 1948).

stressed evidentiary matters; *e.g.* the good faith intention of the parties to join together for a business purpose; the possession by each member of an interest in the enterprise; the holding out to and/or recognition by others of such a relationship; and the contribution of services and/or capital by, the managerial participation of, and the profit and loss sharing of those so associated.[6] All joint ventures, however, are not considered for taxation to be partnerships; *e.g.* one solely to share expenses or the mere co-ownership of rental property without maintaining a business or trade without dividing the profits or losses or providing services to the occupants either directly or through an agent.[7] The failure to contribute capital at the beginning of a business does not obviate the existence of a joint venture which encompasses numerous forms of organization and activities.[8]

The Code provides an elective exclusion to those partnerships which are formed solely for investment and not the active conduct of business or those which are availed of only for the joint production, extraction, or use of property and not the joint sale of services or property produced or extracted so long as the income of the partners therein can be accurately calculated without the computation of the partnership's taxable income.[9] In addition, an eligible enterprise which desires to be treated as a partnership generally may request such special treatment in an application submitted to the Commissioner within the first ninety days of the taxable year for which such treatment is sought.[10]

II. The Status of a Partnership

A. Income-reporting Function

The Code states that a partnership is not of itself a tax-paying en-

[6] Commissioner v. Culbertson, 337 U.S. 733 (1949); Commissioner v. Williams, 256 F.2d 152 (5th Cir. 1958); Powell v. Commissioner, 256 F.2d 941 (5th Cir. 1958); Aldrich v. Usry, 211 F. Supp. 330 (E.D. La. 1962); Max A. Burde, 43 T.C. 252 (1964), *aff'd*, 352 F.2d 995 (2d Cir. 1965), *cert. denied*, 383 U.S. 966 (1967); Jesse J. Finch, 24 P-H Tax Ct. Mem. 578 (1955).

[7] Treas. Reg. § 1.761-1 (a) (1) (1957).

[8] Walsh Constr. Co. v. Church, 247 F. Supp. 808 (S.D.N.Y. 1965); *cf.* Gilford v. Commissioner, 201 F.2d 735 (2d Cir. 1953); Haley v. Commissioner, 203 F.2d 815 (5th Cir. 1953); Max A. Burde, 43 T.C. 252 (1964), *aff'd*, 352 F.2d 995 (2d Cir. 1965), *cert. denied*, 383 U.S. 966 (1967) (invention development financing is sufficient to constitute joint venture); F. C. Vaughan, 36 T.C. 350 (1961), *rev'd on other grounds*, 333 F.2d 714 (9th Cir. 1964) (division of sales profits by co-owners of cattle sufficient to constitute joint venture); Bentex Oil Corp., 20 T.C. 565 (1953) (informal oil leasing operations sufficient to constitute joint venture).

[9] Int. Rev. Code of 1954, §§ 761 (a) (1), (2). This exclusion is often invoked by investment groups and joint natural resource developers.

[10] Treas. Reg. § 1.761-1 (a) (2) (iv) (b) (1956); *cf.* Rev. Rul. 215, 1957-1 Cum. Bull. 208; Rev. Rul. 465, 1958-2 Cum. Bull. 376.

tity.[11] Being required to file an informational return (Form 1065) which reveals the taxable income of the partnership and the distributive share thereof attributable to each partner, a partnership is, thus, an entity for the determination of the partner's taxable income regardless of the amount or nature of the gain or loss of the partnership. Those possessing an interest in a partnership must report their share of its income in their own return without concern for whether or not the income was actually distributed. Such income is taxable to a partner in the year in which the partnership's fiscal year ends.

B. Conceptual Nature

The confluence of the entity concept and the aggregate or co-ownership theory of the nature of a partnership, which prior to the 1954 revision spawned extreme complexity throughout certain aspects of partnership tax law, was retained in the Code. A single invariable theory, being unattainable in practice, was deemed undesirable despite the fact that the civil law regards a partnership as a separate juridical person. The entity concept construes a partnership as being distinct in character for the sale of a partnership interest; the basis of partnership property; the choice of property depreciation methods; the time at which an item or the distributive share of income or loss is to be included in a particular partner's return; the filing of an informational return as essential to the deduction of partnership expenses which are governed by tax rules at the partnership level; the choice by the partnership of its own tax period and method of accounting; and the partnership's ability, like that of a corporation, to enter into legally binding transactions with a partner or third persons. The entity concept, which appears to dominate the Code, is especially adaptable to larger partnerships possessing a variety of assets. However, several elections throughout the Code permit the application of the aggregate or co-ownership theory which perceives of the partnership as a collection of the partner's interests with tax consequences being applied to the partners individually while the partnership remains only an accounting and information-reporting medium. This theory is manifested, also, by the statutory prescription of separate itemization by the partnership of certain particulars[12] in order to determine the ultimate tax treatment in the hands of the individual partners and the disallowance of specific deductions to the partnership. Transactions between a partner and the partnership are viewed as being

[11] INT. REV. CODE of 1954, § 701; "A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities." *See* Treas. Reg. § 1.761-1 (a) (2) (ii) (1956) (definition of investing partnership); Treas. Reg. § 1.761-1 (a) (2) (iii) (1956) (definition of operating agreements).

[12] INT. REV. CODE of 1954 §§ 702 (a), 703 (a) (1).

in part between the partner and himself and in part between the partner and the other members of the partnership. The aggregate theory, preferred by smaller partnerships, seems to be better suited to attain equity among the partners.

III. Formation

A. Underlying Principles

The tax treatment of the formation of a partnership is founded upon the cornerstones that no gain or loss is derived or suffered by either the partnership or its partners when property is contributed to the firm, whether in the process of being formed or already established, in exchange for an interest therein,[13] that the basis of the contributing partner for his partnership interest is the amount of money plus the adjusted basis of any property contributed,[14] and that the property contributed to the partnership has the same basis when being held by the partnership as it had in the hands of the contributing partner.[15] The latter principle was forged to restrain the judiciary from employing the entity theory which would result in the gain on contributed property being postponed until dissolution or distribution—an event the time of which is at the discretion of the partner.[16] Together these rules preclude immediate tax consequences upon the formation of a partnership, the addition of a new partner to an established partnership, and the contribution to the partnership's capital. However, if the entering partner receives a partnership interest as a means of reparation for performed services[17] or when there is a sale of property to the partnership instead of a capital contribution[18] then gain or loss may be realized by the partner relinquishing his interest.

B. The Partnership Agreement

Although the act of forming a partnership generally does not of itself produce any immediate tax consequences, the provisions made at that time by those entering the endeavor serve as a foundation upon which the tax structure of the partnership is determined. Thus, serious, forward-looking consideration should be accorded the drafting of a partnership agreement.[19] It is essential that the instrument be concise, yet

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[13] Int. Rev. Code of 1954, § 721.

[14] Int. Rev. Code of 1954, § 722.

[15] Int. Rev. Code of 1954, § 723.

[16] Chisholm v. Commissioner, 79 F.2d 14 (2d Cir. 1935); Helvering v. Walbridge, 70 F.2d 683 (2d Cir. 1934).

[17] Treas. Reg. § 1.721-1 (b) (1) (1956). *See* United States v. Frazell, 335 F.2d 487 (5th Cir. 1964).

[18] Treas. Reg. § 1.721-1 (a) (1956).

[19] *See* J. Mulder, Drafting of Partnership Agreements (5th ed. 1967).

include all pertinent substantive and tax aspects of the proposed relationship and, above all else, is understood by the members thereof in order to alleviate the necessity of constant consultation with the drafting attorney and primarily to assure that it accurately represents the intentions of each partner. The partnership agreement should include: provisions dealing with the continuation of the enterprise to avoid liquidation; order of receipt of property or cash upon dissolution; the basis of accounting; the taxable year; the division of partnership property; and income payments upon retirement, as well as the partner's distributive share of income and losses.

Formal execution of a partnership agreement is not required. Any understanding between two or more persons which yields a relationship within the Code's definition of a partnership is deemed for tax purposes as the formation of such an entity. Both the original agreement or subsequent modification thereto may be oral.[20] Additions or revisions which are agreed to by all of the partners or in accordance with the provisions of the original instrument made before the time for filing of the partnership return are included within the partnership agreement,[21] as are those made after dissolution if the personal representative of the deceased partner and the surviving partners consent.[22] Furthermore, on matters in which the partnership agreement is silent, local law governs.[23]

C. Contributions to Partnership Capital

The 1954 Code contains explicit guidelines as to most of the tax aspects of contributions to a partnership and is in sharp contrast with its predecessor which contained only a provision for the carry-over of a partner's basis into a partnership with no mention of whether the contribution created a taxable gain or loss.[24] Under the present procedure a partner's contribution of cash, property, and/or services to the capital of a partnership in exchange for an interest therein usually has no immediate tax effect upon either the partnership or any of its members. No gain or loss is to be recognized.[25] This holds true for a contribution to a partnership being formed, as well as a contribution to a previously established partnership,[26] even to the contribution of installment obligations.[27] However, the recognition of income when a partner's capital

[20] Treas. Reg. § 1.761-1 (c) (1956).

[21] INT. REV. CODE of 1954, § 761 (c).

[22] Alexander v. Sims, 220 Ark. 643, 249 S.W.2d 832 (1952); Taliaferro v. Relndon, 191 Okla. 43, 126 P.2d 696 (1942).

[23] Treas. Reg. § 1.761-1 (c) (1956).

[24] INT. REV. CODE of 1939, § 113 (a) (13).

[25] INT. REV. CODE of 1954, § 721.

[26] S. Rep. No. 1622, 83d Cong., 2d Sess. 94 (1954).

[27] Treas. Reg. § 1.721-1 (a) (1956).

account is increased due to a contribution of another partner is not averted.[28]

Although the factual distinction between a contribution in return for a partnership interest and a sale, lease or loan of property to the partnership accompanied by a receipt of an interest in the enterprise is often an extremely close one, the tax consequences are quite different with the latter situation resulting in a taxable gain or loss to that partner equivalent to the fair market value of the capital interest received and will be recognized at such time as it is transferred to him if no substantial restrictions upon its disposition exist.[29] The substance, not the form, of the transaction will be the determinative differentiating factor.[30]

To make certain that the unrealized appreciation or depreciation in the value of the contributed property will be accounted for upon disposition of a partnership interest, the Code provides that the basis of the contributing partner's interest obtained by the contribution of property, including money, shall be the amount of such money plus the adjusted basis of such property to that partner at the time of contribution.[31] Nonetheless, such appreciation or depreciation thereof may still be sold or exchanged and a capital gain realized even though the selling partner contributed only services.[32] To reflect the same in the partnership's taxable income on a disposition of the property itself, the basis of the contributed property for the computation of gain, loss, depletion, or depreciation must be the adjusted basis of such property to the contributing partner upon contribution.[33] Having successfully postponed any gain or loss to the partners or the partnership until the contributed property is disposed of, the Code pronounces that any gain or loss so realized by the partnership is assigned to the individual partners by the same methods employed if the property had been purchased by the partnership.[34] The character of the property in the hands of the partnership, not its contributor, is determinative of whether or not the gain or loss is capital or non-capital in nature.[35] Additionally, the partnership's holding period includes the time it was held by the contributing partner before

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[28] Treas. Reg. § 1.721-1 (b) (1956).

[29] Treas. Reg. § 1.721-1 (b) (1) (1956).

[30] *See* Treas. Reg. §§ 1.707-1 (a), 1.721-1 (a), 1.731-1 (c) (3) (1956); Rev. Rul. 200, 1957-1 CUM. BULL. 205; Joseph W. Hambuechen, 43 T.C. 90 (1964) (capital contribution rather than loan).

[31] INT. REV. CODE of 1954, § 722.

[32] United States v. Frazell, 339 F.2d 885 (5th Cir. 1964).

[33] INT. REV. CODE of 1954, § 723.

[34] INT. REV. CODE of 1954, § 704 (c) (1).

[35] Oliver v. Commissioner, 218 F.2d 352 (5th Cir. 1955).

he contributed it to the partnership regardless of its capital or non-capital nature in his hands.[36]

D. Basis of Partnership Interest

The interest of a partner in a partnership possesses a basis to facilitate the computation of gain or loss upon its disposition. It is of no important tax significance during the functioning of a partnership, except as a limitation upon a partner's distributive share of the partnership's loss.[37] Upon formation, a partner's basis, distinct from that of the partnership, is equal in amount to the adjusted value paid as consideration for his interest and any property or money contributed to the partnership, regardless of what the partnership financial records reveal as that partner's "capital" or "equity."[38] Nevertheless, the aggregate of all of the partners' bases will usually be the same as the aggregate basis of the partnership's assets, including cash and in simple partnerships this equality will normally continue throughout its existence.[39] The basis of a partner who purchased his interest from another partner instead of at formation is the cost thereof.[40] If the interest is received by gift or inheritance, the basis of such interest is the donor's basis or the basis at the time of the decedent's death.[41] After business operations have commenced, a partner's basis is generally the original basis adjusted by his proportionate share in partnership transactions which increase or decrease his capital interest in the partnership but never is a partner's basis to be decreased below zero no matter how great the partnership loss.[42] Specifically, the following adjustments of a partner's basis must be made:

A. increased by:
   1. his distributive share of partnership taxable income, including capital gains;
   2. his pro rata share of the tax exempt income;
   3. his distributive share of the excess of the depletion deduction over the basis of the property subject to depletion allowed to the partnership;
   4. the assumption of partnership liabilities by the partner and his pro rata share of liabilities incurred by the partnership;
   5. contributions to capital.

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[36] Treas. Reg. § 1.723-1 (1956).
[37] Treas. Reg. § 1.705-1 (a) (1) (1956).
[38] INT. REV. CODE of 1954, §§ 722, 741, 742.
[39] INT. REV. CODE of 1954, § 705 (b); Treas. Reg. § 1.705-1 (b) (1956).
[40] Treas. Reg. § 1.742-1 (1956).
[41] INT. REV. CODE of 1954, § 742; *see* M. Pauline Casey, 38 T.C. 357 (1962).
[42] INT. REV. CODE of 1954, § 704 (d).

B. decreased (but not below zero) by:
1. his pro rata share of partnership losses;
2. his distributions of partnership property;
3. his distributive share of partnership expenditures which are neither deductible nor capital in nature;
4. the assumption by the partnership of his personal liabilities and his pro rata share of the decrease in partnership liabilities through the distribution of property.[43]

This procedure markedly lessens the stringency of the rule limiting the deduction allowed a partner for partnership losses to an amount equivalent to his basis in the partnership since each partner's basis is increased by his proportionate share of partnership liabilities. Constant adjustment of a partner's basis is necessitated by the fact that he is taxed upon his distributive share of realized partnership income or loss without regard for whether or not actual distribution is made[44] and that consideration rightfully should be given the above outlined items.

The Code provides a simple, alternative method for computing the adjusted basis of a partner by reference to his distributive share of the partnership's adjusted basis to which he would be entitled upon dissolution of the partnership. Utilization of this alternative procedure is especially adaptable when the necessary data for computation under the general rules are unavailable or the complexity of calculation is so overburdensome that the general rules for determination cannot be practically applied. The Commissioner has the authority to refuse to grant a partner permission to employ the alternative method if the result is in substantial variance with that of the general rule.[45]

E. Accounting Method and Taxable Period

A partnership may determine whether it will utilize the cash or accrual method of accounting and whether it will follow a calendar or fiscal year. Reporting of income or loss must be based upon the same procedural techniques of accounting as employed in the keeping of a partnership's books[46] and must accurately reflect income.[47] In the selection of a taxable year, the Code instituted a relatively intricate set of

[43] INT. REV. CODE of 1954, § 705 (a).

[44] INT. REV. CODE of 1954, § 705 (a) (1) (A). Treas. Reg. § 1.705-1 (a) (2) (i) (1956).

[45] INT. REV. CODE of 1954, § 705 (b); Treas. Reg. § 1.705-1 (b) (1956); J. B. O'Brien, 31 P-H Tax Ct. Mem. 823 (1962) (in the absence of contrary evidence the basis for a partner's interest in a partnership is equal to his book capital account).

[46] INT. REV. CODE of 1954, § 446 (a).

[47] INT. REV. CODE of 1954, § 446 (b).

rules in order to inhibit the tax avoidance maneuvers prevalent under the 1939 Code. Consequently, both the partnership and its partners will usually adopt the same taxable year since in order to have different taxable years it must be established to the satisfaction of the Secretary or his delegate that a business purpose is the primary motive for such an arrangement.[48] Permission from the Secretary is not necessary for a newly formed partnership to adopt the same taxable year as that of all its principal partners or the same year as that to which all of its principal partners concurrently change.[49] Additional restrictions deal with a change of taxable year. A principal partner, one possessing an interest of five or more percent in the partnership profits or capital,[50] must show a business purpose to change to a taxable year other than the one employed by the partnership.[51] It is insufficient if the transition is to facilitate completion of a partner's income tax returns.[52] An existing partnership may change, without the consent of the Internal Revenue Service, its taxable year only if all of the principal partners possess the same year as that to which the partnership is changing or if all of the principal partners have received permission to change concurrently to that taxable year.[53]

Before 1953, it was generally accepted that a partnership terminated whenever a partner died or retired or whenever a new partner was admitted; thus, enabling the successor partnership to choose any taxable year it desired.[54] However, the Internal Revenue Service ruled that "[o]rdinarily, a partnership will be treated as continuing where the business of the partnership, or a substantial portion thereof, is continued."[55] The Code in the following year codified this view and utilized the requirements for termination presented therein as a standard upon which to determine whether or not the partnership must maintain the taxable year already in use.[56] Thus, a partnership's taxable year is no longer closed upon the death of a partner, the entry of a new partner into the partnership, the liquidation of a partner's interest in the business entity, or the sale or exchange of a partner's interest in the partnership. Although the taxable year does not close as to the remaining partners, it does for the partner who sells or exchanges his interest in a partnership or whose entire interest is liquidated. Thus, where the selling partner

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[48] INT. REV. CODE of 1954, § 706 (b) (1).
[49] Treas. Reg. § 1.706-1 (b) (1) (ii) (1956).
[50] INT. REV. CODE of 1954, § 706 (b) (3).
[51] INT. REV. CODE of 1954, § 706 (b) (2).
[52] Rev. Rul. 182, 1960-1 CUM. BULL. 264.
[53] Treas. Reg. § 1.706-1 (b) (1) (iii) (1956).
[54] *See* Cecil I. Haas, 22 P-H Tax Ct. Mem. 999 (1953).
[55] Rev. Rul. 144, 1953-2 CUM. BULL. 212.
[56] INT. REV. CODE of 1954, § 706 (c); *see* INT. REV. CODE of 1954, § 708 (b).

and the partnership are on different taxable years, it may be wise to have the selling partner retain some interest in the partnership until the end of the partnership's normal accounting period in order to prevent bunching in the partner's individual return of more than one year's partnership income. The Code seems to espouse the theory that the taxable year of a deceased partner is precluded from closing prior to the end of the partnership's taxable year despite the completion of liquidation of the decedent's interest.[57] However, the Regulations take the logical view that closing does occur as to the decedent's interest upon sale or liquidation.[58] Furthermore, a gift of all or part of a partnership interest does not cause a closing of the taxable year as to the donor.[59]

IV. Termination of a Partnership

Although under state civil law the admission of a new partner into a partnership, the death or retirement of a partnership member, the sale of a partnership interest, the division of an existing partnership into two or more entities, or the consolidation or merger of two or more successor firms may effectuate the termination of a partnership, these substantive principles have no impact upon termination for the purposes of federal income taxation.[60] To help quell the unsettling ring of the possibility that a partnership may have terminated under one state's law, but not under another's or vice versa if such was allowed to control is the ordered treatment by the revised Code of termination which is deemed to occur only when either no part of the business or financial operations are being performed as a partnership[61] or fifty or more per cent of the entire interests in the partnership capital *and* fifty or more per cent of the total partnership profits are sold or exchanged within a twelve month period.[62]

Under the first cause of termination the continuation of a com-

[57] Int. Rev. Code of 1954, § 706(c)(2)(ii).

[58] Treas. Reg. §§ 1.706-1(c)(2)(i), (3)(i) (1956).

[59] Treas. Reg. § 1.706-1(c)(5) (1956).

[60] Treas. Reg. § 1.706-1(c)(1) (1956). The discrepancies between state laws and federal tax concepts are detailed in Sullivan, *Conflicts Between State Partnership Laws and the Internal Revenue Code*, 15 Tax L. Rev. 105 (1959) and 15 Tax L. Rev. 229 (1960).

[61] Int. Rev. Code of 1954, § 708(b)(1)(A); Treas. Reg. § 1.708-1(b)(i)(b) (1956) (partnership continues if ex-partner is receiving liquidation payments, rather than purchase payments from individual partners); Karan v. Commissioner, 319 F.2d 303 (7th Cir. 1963) (one partner buys out all the others to transform business into sole proprietorship); James v. United States, 11 Am. Fed. Tax R.2d 1723 (M.D. Ga. 1963) (entire business is liquidated or sold to a stranger); David A. Foxman, 41 T.C. 535 (1964), *aff'd on other grounds*, 352 F.2d 466 (3d Cir. 1965); Charles F. Phillips, 40 T.C. 157 (1963).

[62] Int. Rev. Code of 1954, § 708(b)(1)(B); Treas. Reg. § 1.708-1(b)(iii) (1956).

paratively minor portion of the partnership's activity is sufficient to prevent termination.[63] Even though the death of one member of a two-man partnership can result in termination since the business is no longer operational as a partnership entity,[64] the termination will not occur if the estate or the successor in interest of the decedent continues to share in the profits or losses of the firm[65] or until the decedent's interest is entirely liquidated.[66]

Under the second cause of termination more than one transaction may be considered in the calculation of the fifty per cent standard; yet, successive sales of the same interest may not be. Neither transfers by gift, bequest, or inheritance nor contributions of property to a partnership constitute a sale or exchange under this section of the Code.[67] However, liquidation of a particular partner's interest is not regarded as a termination and, thus, payments thereunder will be included in the computation, as is a sale or exchange to another member of the partnership or so long as a sole proprietorship is not the result.[68] Shifts of interests due to contributions or distributions do not terminate a partnership, but a simultaneous contribution by one partner and distribution to another may be considered such a sale or exchange.[69] Furthermore, the complexity of determining capital and profits, because the amount of capital may vary from time to time due to withdrawals, appreciation or depreciation in the value of partnership assets, etc., may be minimized by eliminating assets which have been reduced to income as of the time of the sale or exchange.[70]

If either of the two prescribed tests are met, then the taxable year of the partnership is closed on either the date of the completion of winding up of the partnership's affairs or the date on which the sale or exchange transpires.[71] If both statutory tests are not met, then the partnership continues for tax purposes despite any membership changes or contrary rules of state law.[72]

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[63] David A. Foxman, 41 T.C. 535 (1964), *aff'd on other grounds*, 352 F.2d 466 (3d Cir. 1965).

[64] INT. REV. CODE of 1954, § 708 (b) (1) (A).

[65] Treas. Reg. § 1.708-1 (b) (1) (i) (a) (1956).

[66] Treas. Reg. §§ 1.736-1 (a) (1) (ii), (a) (6) (1956).

[67] Treas. Reg. § 1.708-1 (b) (1) (ii) (1956); H.R. Rep. No. 2543, 83d Cong., 2d Sess., 61 (1954).

[68] Treas. Reg. § 1.708-1 (b) (1) (i) (1956).

[69] Treas. Reg. § 1.731-1 (c) (3) (1956).

[70] Little, *Tax Planning for Professional Partnerships*, 35 TAXES 993 (1957).

[71] Treas. Reg. § 1.708-1 (b) (1) (iii) (1956).

[72] Treas. Reg. § 1.708-1 (a) (1956).

V. Sale of a Partnership Interest

A. Generally

An interest in a partnership is as a property interest and may be sold either to other partners or to third parties. The tax treatment of the sale or exchange of a partner's interest in a partnership is subjugated to a complex set of rules which demands a precise and knowledgable application.

The initial determination, whether the transaction is a sale within the Code, is often a difficult one in light of the possible similarity to a sale of partnership assets, to a liquidating distribution, or the admission of a new partner by a contribution of capital. The distinction of a sale of a partnership interest from a sale of partnership assets may be required when a partnership is selling out. If all of the partners simultaneously sell their interests in the partnership, the practical effect is the same as if the partnership had sold all of its assets and then distributed the proceeds in liquidation. In the instance in which the selling agreement provided for the sale of specific assets which amounted to all the operating assets of the partnership and the functioning of the business ceased, it has been held that in substance a sale of partnership interests occurred although there was no reference to partnership interests.[73] An attempt by partners to avoid taxes by "selling" their partnership interests with a valuable unassignable contract will be subject to ordinary income treatment since they have actually purchased the relinquishment of that contract.[74]

Another distinction which might have to be made involves a liquidating distribution. A review of the existing case law reveals that the sale for a specified price of a partnership interest to any number of the remaining partners who intended that a sale occur even though the payments were from partnership funds with a partnership note being given for the balance due constituted a sale of a partnership interest,[75] that an agreement which did not provide for any transfers of partnership interest to terminate and dissolve a two-man partnership followed by the distribution to one partner of all the partnership's assets is an instrument of liquidation, rather than of sale, although the retiring partner received as consideration a release from his share of the partnership liabilities,[76] that a sale of partnership interest will be recognized when

[73] Barran v. Commissioner, 334 F.2d 58 (5th Cir. 1964); *see* Kinney v. United States, 228 F. Supp. 656 (W.D. La. 1964), *aff'd per curiam*, 358 F.2d 738 (5th Cir. 1966); John W. Lenney, 38 T.C. 287 (1962); Herbert A. Nieman, 33 T.C. 411 (1959).

[74] Rev. Rul. 394, 1958-2 Cum. Bull. 374.

[75] David A. Foxman, 41 T.C. 535 (1964), *aff'd*, 352 F.2d 466 (3d Cir. 1965).

[76] Andrew O. Stilwell, 46 T.C. 247 (1966).

the selling partner in a two-man partnership receives consideration which included a percentage of future commissions received by the purchasing partner,[77] and that a captital loss occurred upon the sale of an interest in a two-man partnership to the other partner despite the contention that the partnership was liquidated and thereafter an ordinary loss was realized upon the sale of inventory and receivables.[78]

A third possible distinction is that between the sale of a partnership interest and the admission of a new partner by a contribution to capital. A distinction here is necessary since the latter would not result in any immediate tax consequences and would only affect the amount of each partner's distributive share of the profits or losses at the end of the partnership's taxable year.

B. Measurement of Gain or Loss

The gain or loss of a selling partner is measured by the difference between his selling price and his basis for his partnership interest,[79] including his pro rata share of any partnership liability attributed to the interest which is being sold and will increase the basis for his partnership interest.[80] Initial consideration must be given to the selling partner's basis upon acquisition of the partnership interest. If the interest was obtained by the contribution of money to the partnership, then the basis at acquisition is the amount of money contributed.[81] Where property other than money was contributed in the exchange for the partnership interest, the basis of the partnership interest is the adjusted basis of such property to the contributing partner, regardless of whether that interest as shown on the partnership books reflects the value of the contributed property rather than its basis to the contributing partner.[82] If the holding period of the partnership interest is more than six months, then long-term capital gain or loss treatment is applicable.

C. Character of Gain or Loss

The status of the tax law involving the sale of a partnership interest before the adoption of the 1954 Code was marked by a profound conflict between the Internal Revenue Service and the taxpayers. The I.R.S. strongly espoused the view that the gain or loss from the sale of a partnership interest should be fragmented into capital and ordinary gain or

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[77] Charles F. Phillips, 40 T.C. 157 (1963).

[78] Kinney v. United States, 228 F. Supp. 656 (W.D. La. 1964), *aff'd per curiam*, 358 F.2d 738 (5th Cir. 1966).

[79] INT. REV. CODE of 1954, §§ 741, 1001(a).

[80] INT. REV. CODE of 1954, § 752(d).

[81] INT. REV. CODE of 1954, § 722.

[82] *Id.*

loss depending upon the character of the underlying assets since the sale was in actuality one of that partner's pro rata share of the assets held by the partnership. The taxpayers asserted that the entity theory of partnerships should be followed so that the sale of an interest in a partnership would involve the sale of a single, undivided capital asset. The judiciary almost universally supported the taxpayer[83] and, finally, the Service assented.[84] Congress codified the entity concept by declaring that gain or loss upon the sale or exchange of a partnership interest shall be recognized to the transferor partner as gain or loss from the sale or exchange of a capital asset.[85] However, to close the blatantly obvious loophole of converting ordinary business income and income from personal services into capital gain through the exploitation of the "collapsible" partnership, the revised Code instituted the safeguarding exceptions of unrealized receivables and substantially appreciated inventory.[86]

The consideration in a sale or exchange of a partnership interest which is attributable to the selling partner's pro rata share of unrealized receivables and substantially appreciated inventory is regarded as ordinary income or loss.[87] An "unrealized receivable" refers to any legally enforceable, though not necessarily contractual, right which has yet to be included as income under the partnership's method of accounting to payment for non-capital goods which have or are to be delivered and/or for services which have or are to be rendered.[88] In most circumstances an unrealized receivable is money earned, but either yet to be collected or reported as partnership income. Although the term capital asset receives a narrow construction by the courts, this exception is to be broadly construed to include "any rights to income" of the partnership.[89] Consequently, executory contracts for future goods and services are encompassed thereby, e.g., the right to obtain income in the future from a contract to manage an insurance company,[90] unfinished architectural

[83] Swiren v. Commissioner, 183 F.2d 656 (7th Cir. 1950), *cert. denied*, 340 U.S. 912 (1951); Commissioner v. Smith, 173 F.2d 470 (5th Cir. 1949), *cert. denied*, 338 U.S. 818 (1949); Long v. Commissioner, 173 F.2d 471 (5th Cir. 1949), *cert. denied*, 338 U.S. 818 (1949); Commissioner v. Lehman, 165 F.2d 383 (2d Cir. 1948), *cert. denied*, 334 U.S. 819 (1948); Commissioner v. Shapiro, 125 F.2d 532 (6th Cir. 1942); Dudley F. Humphrey, 32 B.T.A. 280 (1935); *cf.* Commissioner v. Whitney, 169 F.2d 562 (2d Cir. 1948), *cert. denied*, 335 U.S. 892 (1948).

[84] G.C.M. 26379, 1950-1 CUM. BULL. 58.

[85] INT. REV. CODE of 1954, § 741.

[86] *Id.*

[87] INT. REV. CODE of 1954, § 751(a); Treas. Reg. § 1.751-1(a) (1965); United States v. Woolsey, 326 F.2d 287 (5th Cir. 1963).

[88] INT. REV. CODE of 1954, § 751(c).

[89] Roth v. Commissioner, 321 F.2d 607 (9th Cir. 1963).

[90] United States v. Woolsey, 326 F.2d 287 (5th Cir. 1963).

contracts at the time a partner retires from the firm but who received money for his share thereof,[91] and a gift by a partner of his interest in the partnership to a charity to the extent of his interest in the installment obligations possessed by the partnership.[92] Additionally included are Section 1245 depreciable and Section 1250 depletable properties to the extent that ordinary income in the form of recapture would be realized upon a sale at fair market value. However, the mere expectancy of profit from an advantageous and long standing business relationship which is properly considered in the nature of good will is not regarded as an unrealized receivable.[93]

A partnership employing the accrual method of accounting will generally have few unrealized receivables since its income is considered as realized when the right to payment becomes fixed and is determinable.[94] A cash basis partnership, on the other hand, could possess a considerable amount of unrealized receivables, such as installment obligations arising from the sale of non-capital assets, uncollected fees whether or not billed, and profits from contracts for the future delivery of goods. Also, it should be noted that any receivable which has been accrued as partnership income is given the same treatment as any other asset because a partner is automatically required to report his distributive share of partnership income realized up to the date of the sale or retirement.

An inventory item within the second exception refers to assets which are held primarily for sale to customers in the ordinary course of trade or business and any other property other than a capital or a Section 1231 asset which, if sold by the partnership or the selling partner, would constitute ordinary income or loss.[95] A 1962 Revenue Act amendment[96] extended this to include foreign investment stock subject to Section 1246 of the Code. A copywright in the hands of the creator,[97] subdivided real estate for sale to customers,[98] and any other partnership property which would be considered an inventory item held by the selling or retiring partner[99] may be embodied within the term inventory. The expanse of this definition demands determination of whether the

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[91] John W. Wolcott, 39 T.C. 538 (1962); *see* Treas. Reg. § 1.751-1 (c) (1) (1965).
[92] Rev. Rul. 352, 1960-2 CUM. BULL. 208.
[93] Treas. Reg. § 1.751-1 (c) (2) (1965).
[94] *See* Treas. Reg. § 1.446-1 (c) (ii) (1961).
[95] INT. REV. CODE of 1954, § 751 (d) (2).
[96] Pub. L. No. 87-834 (Oct. 16, 1962).
[97] INT. REV. CODE of 1954, § 751 (d) (2) (B).
[98] J. Thomas Requard, 35 P-H Tax Ct. Mem. 829 (1966).
[99] INT. REV. CODE of 1954, § 751 (d) (2) (c).

six month holding period has expired in order to exclude such property from the inventory classification.[100]

"Substantially appreciated" means that the fair market value of all inventory items exceeds 120 per cent of the adjusted bases to the partnership of such property and that the value exceeds 10 per cent of the fair market value of all partnership property other than money.[101] The appreciation test must involve the aggregate of all inventory items held by the partnership at the time of sale or distribution. Because of the arbitrariness of the all-or-nothing approach of the above mechanical definition for substantial appreciation, important tax consequences may be dependent upon the current valuation of inventory in instances where such appreciation is just above or below the twenty per cent line.

Accounts receivable whether or not realized are inventory items.[102] Thus, aside from being considered ordinary income to the selling partner as an unrealized receivable, it is, also, a factor in the determination of substantial appreciation. A zero basis is, generally, ascribed to unrealized receivables and, consequently, its total value should represent appreciation.[103] Further, the inclusion of accounts receivable will have no effect upon the 120 per cent test since the basis thereof when it is transformed into income is equal to its face amount.[104] Incorporating these accounts in the value of inventory items for the 10 per cent test will facilitate satisfactorily the computation of that standard.

D. Holding Period

Since the Code presents no time specifications for a partner's holding period in regards to the sale of a partnership interest, the general rules seem to govern.[105] Thus, each partner's holding period for his partnership interest is measured from the date of his acquisition thereof, regardless of any subsequent personnel changes.[106] Even in the cases where the transition in partnership membership is sufficient to result in a termination of the partnership, a partner's holding period for his interest in the successor entity should include the holding period under the predecessor partnership as long as the basis for his interest in the partnership remains unchanged by the constructive distribution to him

[100] INT. REV. CODE of 1954, § 735; Treas. Reg. § 1.735-1 (b) (1965); Commissioner v. Lehman, 165 F.2d 383 (2d Cir. 1948).

[101] INT. REV. CODE of 1954, § 751 (d) (1).

[102] Treas. Reg. § 1.751-1 (d) (2) (ii) (1965).

[103] Treas. Reg. § 1.751-1 (c) (2) (1965).

[104] A. B. Culbertson, 14 T.C. 1421 (1950).

[105] INT. REV. CODE of 1954, § 1223.

[106] *See* United States v. Shapiro, 178 F.2d 459 (8th Cir. 1949); Commissioner v. Lehman, 165 F.2d 383 (2d Cir. 1948), *cert. denied*, 334 U.S. 819 (1948).

and the recontribution by him of his share of the assets and liabilities of the entity.[107] Furthermore, a partner who initially acquires his interest in a partnership in exchange for the contribution of capital assets or Section 1231 property is allowed to "tack" the period during which he held the contributed property before contribution to the holding period for his partnership interest.[108] Assets distributed to a partner, but not acquired through the purchase of a deceased partner's interest which results in a termination of the partnership, may be included within its holding period.[109]

E. Partnership's Election to Adjust Basis of Partnership Assets

1. *The Election*

Upon the purchase of an interest of a partnership which is a non-depreciable asset,[110] the transferee's basis will often differ from the seller's basis prior to the sale. Such difference is usually attributable to the appreciation or depreciation in the value of partnership property, including goodwill. Thus, the purchase price is different from the value of his proportionate share of the basis of the partnership assets. No doubt where appreciation in the value of the partnership occurs and the consideration tendered to the selling partner exceeds the basis for the interest, the transferee partner will seek an adjustment in the basis of the properties held by the partnership.

However, the law prior to the 1954 Code was,[111] and the general rule of the revised Code is, that no change in the basis of partnership assets occurs upon the transfer by sale, exchange, or death by any partner of his partnership interest.[112] This rule does not apply where one individual purchases the interests of all the partners and the partnership is terminated.[113] To alleviate the inequities that could invariably result from the sale or exchange of a partnership and to allow the partnership to avoid complexity in its accounting system, the Code contains an election which, if exercised by the partnership, permits an adjustment of the bases of its properties.[114] In order for such adjustments to take effect, the partnership must file with its next tax-reporting return a

[107] 2 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT, AND ESTATE TAXATION 1685a (1969).

[108] INT. REV. CODE of 1954, §§ 1223(1), 722.

[109] Edwin E. McCauslen, 45 T.C. 588 (1966).

[110] John Sumers, 36 T.C. 467 (1961).

[111] Robert E. Ford, 6 T.C. 499 (1946).

[112] INT. REV. CODE of 1954, § 734(a).

[113] *Cf.* C. E. Silling, 27 T.C. 701 (1957); Nathan A. Blum, 5 T.C. 702 (1945).

[114] INT. REV. CODE of 1954, § 743(b).

Section 754 election signed by one of the partners and must state that the partnership elects to apply the provisions of Sections 734 (b) and 743 (b).[115] Also, the transferee partner must attach a similar statement to his own return for the first taxable year in which the adjustment is pertinent in determining his income tax.[116] The election is binding for that and all subsequent taxable years for all purposes in which basis is involved, including depreciation, depletion, partnership distributions, and the sale of partnership property, unless revoked with the permission of the District Director. The request for revocation must be for business reasons, such as an alteration or diversification in the operations of the partnership, a substantial change in the nature of the property held by the partnership, or frequent transitions in partnership membership, and not to prevent a reduction in the bases of the partnership assets upon a subsequent transfer of partnership interest.[117]

The adjustment, which is only for the benefit of the purchaser, is the difference between the transferee's basis for his partnership interest and his pro rata share of the adjusted basis of the partnership property which is equal to the sum of his interest as a partner in the partnership capital and surplus in addition to his share of the partnership liabilities.[118] If the partnership assets have appreciated in value, the adjusted basis of these assets will be increased by the excess of the transferee partner's basis for his partnership interest over his share of the adjusted basis to the partnership of all partnership property. Where partnership assets have decreased in value, the adjusted basis of the partnership assets will be decreased by the excess of the transferee partner's share of the adjusted basis of all partnership property over his basis for his partnership interest. If, however, the capital and profit ratios vary, then each partner's share is computed by considering his interest in the unrealized appreciation or depreciation in value under the partnership agreement.[119] Where a series of transfers of the same partnership interest is involved, the special adjustment is determined for the last transferee without giving consideration to the adjustment for intermediate transferees.[120]

2. *Treatment of Contributed Property*

A partnership which has elected to adjust its basis and which possesses property contributed by a partner at a value at variance with its

[115] Treas. Reg. § 1.743-1 (b) (1956); Rev. Rul. 347, 1957-2 CUM. BULL. 365.
[116] Treas. Reg. § 1.743-1 (b) (3) (1956).
[117] Treas. Reg. § 1.743-1 (c) (1956).
[118] Treas. Reg. § 1.743-1 (b) (1956).
[119] Treas. Reg. § 1.743-1 (b), example 2 (1956).
[120] Treas. Reg. § 1.743-1 (b) (2) (iv) (1956).

basis must perform the intricate task of adjusting the basis of the contributed property. Each partner's allocable share of the basis is determined in accordance with the provisions of the partnership agreement in respect to the contributed property.[121] The purchasing partner will receive the benefit of a special basis for his interest in the partnership's contributed property which will reflect the purchase price. Nevertheless, the remaining partner's basis will not change. The amount of adjustment required may not be the same when the interest was purchased from the contributing partner as when the interest was purchased from the non-contributing partners.[122] Furthermore, the partnership agreement should so provide if the contributor is to bear the tax consequences of a difference between the adjusted basis of the contributed property at the time of contribution and the value of such property.

3. *Treatment of Depreciable and Depletable Property*

A transferee partner in a partnership which has elected to adjust its basis and which possesses depreciable or depletable property must compute his depreciation or depletion with respect to such property separately.[123] Thus, it is possible for the successor partner to choose cost depletion on his special basis while the other partners employ percentage depletion and for him to calculate separately his share of any subsequent gain under the recapture provisions of Sections 1245 and 1250.[124]

F. Transferee's Election to Adjust Basis

A transferee partner, in the instance where the partnership does not take the bases-adjusting election of Section 743 (b), may himself elect to treat the adjusted partnership basis for property, other than money which is distributed to him within two years after acquiring an interest in the partnership, to be the same as the adjusted bases such property would have had had the partnership made its election.[125] The above may be accomplished by attaching a schedule of the basis adjustment[126] to the return for the year of distribution of any property subject to depreciation, depletion, or amortization or the return for the first taxable year in which the basis bears upon the transferee partner's tax liability.[127] The mechanics of this (§ 732d) and the partnership's

[121] INT. REV. CODE of 1954, § 743 (b).

[122] Treas. Reg. § 1.743-1 (b) (2) (i) (1956); *see* H.R. Rep. No. 2543, 83d Cong., 2d Sess. 61 (1954).

[123] INT. REV. CODE of 1954, § 743 (b).

[124] Treas. Reg. §§ 1.1245-1 (e) (3), (4) (1965).

[125] INT. REV. CODE of 1954, § 743 (b); Treas. Reg. § 1.743-1 (b) (1) (1956).

[126] Treas. Reg. § 1.732-1 (d) (3) (1956).

[127] Treas. Reg. § 1.732-1 (d) (2) (1956).

(§ 734b) election is performed by determining the difference between the transferee's basis and his proportionate share of the basis of all partnership assets in order to obtain the total amount of the transferee's special adjustment. Then, this figure is allocated by using a ratio based on the difference between the adjusted basis and the market value of capital and Section 1231 assets or any other property. The final result may be either an increase or a decrease in the transferee partner's basis.

Such adjustment, however, is not decreased by any depreciation or depletion on the part of the basis of the distributed property which results from the transferee's election (§ 732d) because no depreciation or depletion is allowed thereto without the partnership making its (§ 734b) election.[128] To the extent that the transferee partner relinquishes his interest in property retained by the partnership and which would have been adjusted in the partnership (§ 734b) election, the transferee partner may elect to adjust the basis of other property distributed to him.[129]

This adjustment to basis is mandatory for any distribution, no matter when made, to the transferee partner if at the time of purchase the fair market value of the partnership property, excluding money, was in excess of 110 per cent of its adjusted basis to the partnership.[130] However, the transferee's election is not applicable in the situation in which that partner distributes property with a special basis adjustment in his favor to another partner. Reallocation of the special basis adjustment to retained partnership property of a like kind or to like distributed property is permissible if it is received by transferee partner.[131]

VI. Distributions in Liquidation

A. Generally

Distributions may involve the complete liquidation of the entire business entity or the payment for a retiring partner's interest therein. Upon a decision to liquidate the entire business entity, the partnership has the alternative of selling all of its assets, paying off all of its liabilities, and then distributing the remaining proceeds among the partners or of simply distributing all of the partnership assets among the partners with the proceeds receiving either capital gain or ordinary income treatment. The treatment depends upon the character of those assets in the hands of the partnership on a pro rata basis or by giving assets of the proper value to each partner. Such complete liquidation

[128] Treas. Reg. § 1.732-1 (d) (1) (iv) (1956).
[129] Treas. Reg. § 1.732-1 (d) (1) (v) (1956).
[130] Treas. Reg. § 1.732-1 (d) (4) (1956).
[131] Treas. Reg. § 1.732-1 (c) (1956).

is generally neither necessary nor desirable when it is in payment for the partnership interest of a partner who does not sell that interest to a third party or the remaining partners. Thus, provisions in the partnership agreement should be made for the continuation of the partnership upon the death or retirement of a partner in order to preserve the firm's value as a going concern and certain corresponding tax advantages.

A distinction must be made between a liquidating distribution and partnership reorganization. The transition in either the amount or the ownership of a partnership can occur in a myriad of ways. The primary question is, at what point do such transitions constitute liquidating distributions and to which partners? A team of noted legal writers has surmised that "the basic question is whether the partnership 'continues' or 'terminates' under the tests applicable to the closing and changing of taxable years."[132] As to another necessary distinction, involving the judicial sale of partnership assets to the remaining partners as a consequence of litigation between those partners, the Service has declared that a liquidation of the withdrawing partner's interest takes place rather than a sale of partnership assets.[133] A further distinction is required between liquidating distributions and payments of income to a retiring or successor partner which usually is in accordance with provisions in the partnership agreement and represent a continuing interest in the operation of the partnership without terminating a withdrawing partner's tax year until all such payments are consummated.[134] Current distributions are governed by a separate set of tax rules which are outside the scope of this article, but are to be differentiated from distributions in liquidation.

B. Recognition of Gain or Loss

Under the general rule, there will be no gain or loss recognized to either the partner (s) or the partnership upon a liquidating distribution of property.[135] However, three important exceptions exist and they are: 1) a gain shall be recognized to a withdrawing partner when the amount of cash distribution exceeds his basis in the partnership;[136] 2) a loss shall be recognized to a retiring partner when the distributed assets consist only of money, unrealized receivables, or inventory;[137] 3)

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[132] 2 J. RABKIN & M. JOHNSON, *supra* note 107 at 1275; *see* Treas. Reg. § 1.708-1 (b) (1) (iv) (1956).

[133] Rev. Rul. 264, 1966-2 CUM. BULL. 248.

[134] *See* INT. REV. CODE of 1954, § 736 (a).

[135] INT. REV. CODE of 1954, §§ 731 (a), (b).

[136] INT. REV. CODE of 1954, § 731 (a) (1).

[137] INT. REV. CODE of 1954, § 731 (a) (2).

a distribution other than one based upon the retiring partner's pro rata share which is treated as a taxable sale or exchange.[138]

C. Distributions of Cash and Property

The gain realized by a withdrawing partner on a liquidation distribution is capital in nature and a long-term one if the property has been held for more than six months, including the period during which the property was held by the partnership.[139] Such gain is limited to and measured by the excess value of the cash distribution over the withdrawing partner's basis of his partnership interest. It is to be remembered that the receipt of property other than money, unrealized receivables, and inventory precludes the recognition of a gain.[140]

No adjustments for the withdrawing partner's basis are necessary since his partnership interest is terminated by the liquidation distribution. However, the basis of the remaining partnership assets may be increased by an equivalent amount if a Section 754 election is in effect or may be decreased to the extent of any loss recognized by the distributee following a distribution of cash, unrealized receivables, or inventory. Any increase in the basis of the remaining partnership assets must be apportioned between capital and Section 1231 assets on the one hand and other property on the other hand by employing a ratio derived by the difference between the adjusted basis and the market values of the two classes of assets in the same manner as discussed herein under the adjustment of a transferee's basis. If a decrease in basis is called for, the entire amount of the adjustment is to be attributed only to those assets whose bases exceed their fair market value by utilizing the ratio between the adjusted basis and the value of each asset.[141] Any such decrease in basis due to a capital loss is allocable to capital or Section 1231 assets only. If the above adjustment computations vitiate the basis of any asset, then basis is maintained at zero until the subsequent acquisition of assets of that class to which the "basis" below zero may be applied.[142]

D. Distributions of Unrealized Receivables and Inventory

A partner may realize a loss in a liquidating distribution involving only money, unrealized receivables, and inventory.[143] Unrealized re-

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[138] INT. REV. CODE of 1954, § 751 (b).

[139] INT. REV. CODE of 1954, § 735.

[140] INT. REV. CODE of 1954, § 731.

[141] Treas. Reg. § 1.755-1 (1956).

[142] INT. REV. CODE of 1954, § 734 (b).

[143] INT. REV. CODE of 1954, § 731 (a) (2); Treas. Reg. §§ 1.731-1 (a) (2), 1.732-1 (c) (2) (1956).

ceivables are defined in the same manner for the present purpose as discussed in relationship to sale of a partnership interest.[144] Inventory, not being limited to that which is substantially appreciated, includes any property held for sale to customers in the ordinary course of trade or business.[145] From the wording of this section of the Code and its treatment in the Regulations, it would appear that the receipt of a minimal amount of property other than cash, unrealized receivables, and inventory would preclude the realization of a loss, as would a realized receivable. In addition, an especially difficult differentiation problem arises between an agreement of one member of a two-man partnership to purchase the co-partner's interest and an agreement by that partnership to acquire such interest for a similar amount in consideration for his relinquishing his interest therein.

If only cash, unrealized receivables, and inventory are distributed, then loss is recognized to the extent that the distributee's adjusted basis for his partnership interest at such time exceeds the amount of any money and the basis to the partnership of any unrealized receivables or inventory distributed to him.[146]. This formula becomes quite complex and upon implementation the Regulations should be resorted to for amplification of the intricate maneuvers required.[147]

E. Non-pro rata Distributions

A withdrawing partner, who receives in a distribution as an exchange unrealized receivables or appreciated inventory for all or a portion of his interest in other property retained by the partnership or other property for all or a portion of his interest in unrealized receivables or appreciated inventory retained by the partnership, is subject to gain or loss similar to that of a sale or exchange. The character of the gain or loss is controlled by the character of the disposed assets. Such gain or loss is the difference between the withdrawing partner's pro rata adjusted basis of the unrealized receivables and appreciated inventory retained by the partnership and the market value of the other property received. The partnership's gain or loss upon its distribution sale is the difference between the adjusted basis of the unrealized receivables and appreciated inventory relinquished and the fair market value of the distributee partner's interest in the retained property. The transferee will be considered a purchaser for cash and, thus, recognizes no immediate tax consequences so long as the property is acquired for money. If, however, other property is involved, then the distributee

[144] INT. REV. CODE of 1954, § 751 (c).
[145] INT. REV. CODE of 1954, § 751 (d) (2).
[146] INT. REV. CODE of 1954, § 731 (a) (2); Treas. Reg. § 1.731-1 (a) (2) (1956).
[147] Treas. Reg. § 1.731-1 (a) (2) (1956).

partner, taking receivables and inventory in release of his interest in the other assets of the partnership, will be subject to gain or loss to the extent of the difference between his share of the adjusted basis of the other partnership assets and the market value of the receivables or inventory.[148] The above does not apply to all non-pro rata distributions since the Code simply requires an exchange with the intentions of the parties generally governing. Payment for services or for the use of capital, current drawings and advances against a partner's distributive share of earnings, distributions which include only the distributee's share of the partnership's receivables, inventory, or other property, and distributions of property contributed by the distributee are circumstances which escape treatment under Section 751 (b).[149]

VII. Death or Retirement of a Partner

A. Generally

The revised Code valiantly attempted to find solutions for the myriad of problems surrounding the death or retirement of a partner. The principal questions left open before the 1954 Code and those the framers thereof sought to answer were: 1) whether, and to what extent, the right to payments made to a retired partner or a deceased partner's estate or beneficiaries after the retirement or death is includible in the decedent's estate; 2) whether the decedent's estate or his beneficiaries are to be taxed upon such payments as current income; and 3) whether the remaining partners are entitled to reduce their distributive shares of partnership income by the sums to which the retired partner or the decedent's estate are entitled. In addition, there existed the inherent problem of distinguishing payments made by a partnership in liquidation of a partner's interest and payments made by the remaining partners as individuals to purchase the partnership interest of retired or deceased partner.

B. Methods of Payments

The revised Code struggled to discard the importance of the form of the payments to a retired partner or a deceased partner's estate or beneficiaries by providing that the tax consequences should be determined by the nature of the interest being paid for. Thus, payments which are made in the liquidation of the interest of a retiring or deceased partner were classified as either payments in exchange for the interest of such partner in partnership property or other payments.[150]

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[148] Int. Rev. Code of 1954, § 751 (b); Treas. Reg. § 1.751-1 (1965).
[149] Int. Rev. Code of 1954, § 751 (b) (2); Treas. Reg. § 1.751-1 (b) (2) (1965).
[150] Int. Rev. Code of 1954, § 736.

Such classification is only applicable to payments by the partnership and not to transactions between the partners.[151]

The "interest in partnership property" category is treated as liquidating distributions by the partnership. The two specific exceptions which do not receive such consideration are unrealized receivables[152] and goodwill of the partnership in the absence of partnership provisions thereto.[153] Thus, any payment as consideration for unrealized receivables is an income payment which is taxable to the recipient as ordinary income and reduces the distributive shares of the remaining partners. If, however, the partner is entitled to a basis for unrealized receivables by virtue of his original purchase of his partnership interest, then payments for such unrealized receivables are liquidating distributions.[154] Case law before the 1954 Code, which in this area of partnership taxation is of persuasive influence, holds that if a payment is made for the estimated value of all receivables, then such is immediately deductible by the partnership as a guaranteed payment despite the fact that some of the accounts would not be realized as income for several years.[155] The goodwill exception is of especial significance to partnerships providing personal services, such as professional partnerships, since partners can make an advance determination of the tax consequences. If the partnership agreement provides that payments are to be made with respect to goodwill, then such payments are considered to be liquidating distributors; otherwise, they are treated as income payments.[156] The courts have construed this exception strictly and have not allowed intent to compensate for goodwill or to be drawn from the surrounding circumstances.[157] However, in one instance an amendment modifying the original partnership agreement, which was silent as to payments for goodwill, to so provide in the amendment even though it contained conflicting provisions enabled the court to find the requisite intent to provide for goodwill payments.[158] This exception is limited to goodwill in excess of its partnership basis, including any special basis adjustments to which the recipient partner is entitled.[159] All intangible rights are not goodwill and, thus, fixed annual liquidation payments have been deemed to be guaranteed payments when they were attributable to intangible assets and the partnership agreement made no reference to

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[151] Treas. Reg. § 1.736-1 (a) (1) (i) (1965).
[152] INT. REV. CODE of 1954, § 736 (b) (2) (A).
[153] INT. REV. CODE of 1954, § 736 (b) (2) (B).
[154] Treas. Reg. § 1.736-1 (b) (2) (1965).
[155] Raymond S. Wilkins, 7 T.C. 519 (1946), *aff'd*, 161 F.2d 830 (1947).
[156] INT. REV. CODE of 1954, § 736 (b) (2) (B).
[157] Smith v. Commissioner, 313 F.2d 16 (10th Cir. 1962).
[158] Commissioner v. Jackson Inv. Co., 346 F.2d 187 (9th Cir. 1965).
[159] Treas. Reg. § 1.736-1 (b) (3) (1965).

goodwill.[160] The value, if reasonable in amount, placed upon goodwill by an arm's length agreement between the partners is regarded as correct regardless of whether specific in amount or derived by a formula.[161] A 1952 Tax Court case casts disfavor upon the contention that goodwill exists in professional partnership situations,[162] and a 1960 Revenue Ruling espouses the view that no portion of a sales price can contain payments in consideration of goodwill when a firm is dependent solely upon the professional skill or other personal characteristics of the seller.[163]

The "other payments" category is treated either as a distributive share of partnership income if the amount is determined with regard to the income of the partnership or as a guaranteed payment if the amount is determined without regard to the income of the partnership.[164] Included are payments for the distributee's pro rata share of partnership receivables and goodwill, unless goodwill is provided for in the partnership agreement as a reasonably valued partnership asset. There is no time limitation on the period over which such payments may be extended;[165] however, since the scope of Section 736 is limited to payments made in *liquidation* of the interest of a retiring or deceased partner, such payments may be precluded from being extended for an indefinite duration. Such payments constitute ordinary income to the recipient and are taxable as if made to an active partner since the retired or decedent's successor in interest is sharing in the current earnings of the partnership. The amount of such payments, having been treated as distributive shares of partnership income to the recipient, are not included in the distributive shares of the remaining partners.[166] Thus, the rules pertaining to liquidating distributions are not applicable.

Allocation must be made when continuing payments are received by a retiring partner or a successor in interest of a deceased partner, between the classes in payments which are in part for "interests in the partnership property" and in part of additional fixed or unfixed amounts as guaranteed payments or a distributive share of partnership income. If a sum is fixed and to be received in installments, despite the fact that any unfixed payments, also, are to be paid, then each installment is to be apportioned between the part of each payment which will be treated as a distribution and the remainder which will be regarded as income in the form of either guaranteed payments or a distributive share of partnership income. That portion designated as a distribution is based upon

[160] Norman E. Ritter, 33 P-H Tax Ct. Mem. 1425 (1964).
[161] Treas. Reg. § 1.736-1 (b) (3) (1965).
[162] Carol F. Hall, 19 T.C. 445 (1952).
[163] Rev. Rul. 301, 1960-2 Cum. Bull. 15.
[164] Int. Rev. Code of 1954, § 736 (a).
[165] H.R. Rep. No. 2543, 83d Cong., 2d Sess. 59-60 (1954).
[166] Treas. Reg. §§ 1.736-1 (a) (3), (4) (1965).

a proportionate part of the total agreed fixed payments, regardless of actual distribution. Any future payment which compensates for the failure to distribute the expected sum will be regarded as a distribution. If an unsegregated amount is specified, then an amount equal to the partner's interest in the fair market value of the net assets is to be considered a liquidating distribution and the remainder designated as income payments. Where the amount of mixed payments is determined by a percentage of partnership income or any other formula devised by the partners, so long as the total amount attributed to partnership assets does not exceed their fair market value at the date of death or retirement, the installments are allocated first to the partnership assets as a distribution thereof and then the balance treated as income payments.[167]

C. Timing of Income

A retiring partner's distributive share of partnership income for the period before his retirement is not vitiated by a liquidating distribution regardless of whether a fixed amount is agreed upon in consideration of such share.[168] The Tax Court has disallowed a loss based upon depreciation in the value of assets acquired by the surviving partner and used to pay off debts of the partnership for the taxable year terminating with a partner's death.[169] Ordinary income treatment is given litigation damages awarded to the partnership for the loss of earnings while the taxpayer was a partner, unless this figure was included in the distribution price.[170]

As to a partially retired partner who has decreased his capital and profit shares, apparently any payment received attributed to his relinquished interest would be taxed as a current distribution with the excess over the basis of entire interest being treated as a captial gain.[171] The reduced pro rata share of partnership income is taxed as a distributive share.

The distributive share of partnership income prior to the death of a partner is reported by his successor in interest, usually his estate or beneficiaries, since the death does not of itself close the partnership's taxable year as to the decedent. The income attributed to the estate includes the decedent's entire distributive share despite the fact that a portion of the income was withdrawn by the deceased partner before death. However, the withdrawn portion is not subject to estate tax

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[167] Treas. Reg. § 1.736-1 (b) (5) (1965).
[168] INT. REV. CODE of 1954, § 706 (c) (2).
[169] Joseph C. Lincoln, 24 T.C. 669 (1955).
[170] Norman E. Ritter, *supra* note 160.
[171] *Cf.* Ruth W. Collins, 14 T.C. 301 (1950).

except to the extent reflected in the decedent's individual assets.[172] The right to receive this income in respect of a decedent which has not been withdrawn will not be given a stepped-up basis because of death.[173] The estate will, nevertheless, be entitled to a deduction for any estate tax paid on the right to receive such payments[174] which will, in the hands of the estate, retain the same character as when received by the decedent.[175]

D. Accounting and Taxable Year

A partnership and the partners therein often possess different taxable years. In such an instance, if the retiring or deceased partners are under variant taxable periods, distinct problems arise regarding the inclusion of partnership income for a period in excess of twelve months in one year's tax return and the separation of income in respect to a decedent and its kindred deductions from the decedent's personal deductions and exemptions.

The retirement of a partner neither closes the partnership's taxable year with respect to the remaining partners nor terminates the relationship. However, the partnership year is considered closed as to the retiring partner whose interest is liquidated by a distribution or by Section 736 (b) payments which are treated as liquidating distributions. On the other hand, income payments under Section 736 (a) do not cause a termination of the taxable year to the recipient until the payments cease.[176] If less than a partner's entire interest is relinquished, then the taxable year of the partnership remains open with respect to such partner whose distributive share of the particular income and loss items of the partnership is calculated by considering his varying interests in the partnership during the taxable year.[177]

As to a deceased partner, a different solution is presented. The taxable year of the partnership with respect to a deceased partner does not close prior to the end of the partnership's taxable year, if the partnership is not itself terminated,[178] or before the time in which the decedent's entire interest is liquidated, sold, or exchanged,[179] whichever is earlier.

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[172] *Cf.* Treas. Reg. § 1.706-1 (c) (3) (v) (1956); Estate of Arthur H. Hull, 38 T.C. 512 (1962), *rev'd on other grounds*, 325 F.2d 367 (3d Cir. 1963).

[173] INT. REV. CODE of 1954, § 1014 (c); Treas. Reg. § 1.742-1 (1956).

[174] INT. REV. CODE of 1954, § 691 (c).

[175] INT. REV. CODE of 1954, § 691 (a) (3); Treas. Reg. § 1.691-1 (a) (3) (b) (1) (1965).

[176] INT. REV. CODE of 1954, § 706 (c) (2) (A) (i); Treas. Reg. § 1.706-1 (c) (2) (ii) (1956).

[177] INT. REV. CODE of 1954, § 706 (c) (2) (B); Treas. Reg. § 1.706-1 (c) (4) (1956).

[178] INT. REV. CODE of 1954, § 706 (c) (2) (A) (ii).

[179] INT. REV. CODE of 1954, § 706 (c) (2) (A) (i).

Thus, after the partnership year closes the decedent's distributive share of partnership income is reported by the estate as income in respect of a decedent, rather than in the decedent's final return. Since death does not normally terminate the partnership for tax purposes, the remaining partners will experience no income bunching upon the death of a partner. However, the decedent and the remaining partner of a two-man partnership, if they use different taxable periods, may experience bunching of income through the working of a termination which could be avoided by the successor of the decedent continuing in the capacity of a partner, if Section 736 (a) income payments are being made to the deceased partner's successor in interest, or by having the decedent's estate make an immediate distribution to the surviving spouse.[180] The problem of separating income in respect of a decedent and its kindred deductions from the decedent's personal deductions and exemptions can be alleviated by provisions in the partnership agreement that on the day of a partner's death a sale of his partnership interest to the remaining partners will be affected.[181]

Timothy R. Smith

[180] Treas. Reg. § 1.736-1 (a) (6) (1965).
[181] *See* Treas. Reg. § 1.706-1 (c) (3) (iv) (1956).

STUDENT NOTES

Deeds—Constructive Delivery of Deeds in Mississippi

The purpose of this paper is to determine the governing factors which must be present before the Mississippi court will consider a deed to be constructively delivered. The rule has varied from time to time so that it is now necessary to delve in detail into the pronouncements of the case law. For the reason that the courts have considered this question as an ad hoc decision, depending upon the facts of each case, a search from the earliest cases concerning constructive delivery is required.

I. General Rule and Mississippi Cases to 1948

It appears that the general rule concerning the constructive delivery of deeds, that is, recordation without manual delivery from grantor to grantee, is that recordation in and of itself is only prima facie evidence of passage of title.[1] The intent of the parties at the time of recordation is the controlling factor as to sufficiency of delivery.[2]

> As a general rule the filing and recording of a deed is prima facie evidence of delivery, but this presumption is rebuttable.[3]

In the case of *Ingraham v. Grigg*,[4] the Grand Gulf Bank had executed a deed of assignment of its effects in trust for its creditors. As Justice Clayton stated:

> It was also recorded, which amounts at least to *prima facie evidence of delivery*.[5] (emphasis added).

Again, in *Bullit v. Taylor*,[6] the rebuttable presumption of constructive delivery of recordation is commented upon:

> The act of making, acknowledging and having the deed recorded, would not be sufficient to transfer title, for the reason that a contract can only be consummated by the act of two persons, or, in technical language, by the assent of two minds, one agreeing to part with, and the other to accept the title. Until the deed was delivered it was at most but a proposition to convey, which could have been withdrawn at any time before it was accepted by the other party. It is no answer to this proposition to say, that when a deed has been properly acknowledged and recorded, a delivery will be presumed, for this presumption, like all presumptions, which exist only for the sake of convenience, must yield to facts, when established. The bill alleges that the deed was not delivered, and this allegation being admitted, it

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[1] 16 Am. Jur. *Deeds* § 153 (1944); 26 C.J.S. *Deeds* § 51 (1942); 23 Am. Jur. 2d *Deeds* § 94 (1965).

[2] *Id.*

[3] 8 G. Thompson, Real Property, § 4240, at 107-08 (1963).

[4] 21 Miss. 22 (1849).

[5] *Id.* at 29.

[6] 34 Miss. 708 (1858).

> is no longer a question as to what facts will be presumed, but what facts exist to overthrow the presumption. If the rule were once firmly established that the registry of a deed should be taken as conclusive evidence of a delivery, a man desiring to defraud his creditors would have nothing to do but to describe some fictitious person as a grantee for a valuable consideration, in a deed, acknowledge it, and have it made a matter of record . . . .[7]

Similar language is found in *Claiborne v. Holmes.*[8] *Metcalf v. Brandon*[9] was concerned with a conveyance of one-half interest in a plantation by father to son with a parol agreement to hold for the benefit of the grantor's daughter, the appellant in the case. The son then became indebted and, to avoid creditor's claims thereon, recorded the deed in favor of a Mrs. Brandon. Mrs. Brandon at first repudiated the conveyance. The appellant filed suit to have legal title conveyed to her. That suit was dismissed as being contra to the statute of frauds. Mrs. Brandon then instituted an action for ejectment of the appellant based on her right to the plantation upon the recordation of the deed by the son. The question that was considered was whether there had been sufficient delivery to and acceptance by Mrs. Brandon of the deed. The court reiterated earlier cases by stating that recordation is strong presumption of delivery and that acceptance will be inferred from "slight circumstances."[10] This presumption was "overthrown" by the proof that Mrs. Brandon had in no way accepted the delivery, and hence, no title passed.[11]

In another case, a mother executed and recorded a deed of her residence to her daughter and placed it in her home. The grantee did not know of the deed's existence until the mother, just before her death, stated that the property was the grantee's. The court held delivery to be sufficient.[12] The exact opposite result was reached in the important case of *Lynch v. Lynch.*[13] In the *Lynch* case, a father, in bad health, signed and acknowledged a deed to his son and had it recorded. The son did not know of the deed's existence. The court ruled that it was necessary for the son to show delivery of the deed before it would be valid, and the mere resting on the presumption of delivery is not sufficient.[14] The court also stated that intention is never in itself enough; an act of delivery must be shown.[15] The appellant in another case sought to have a contract of option on land enforced against a husband and wife. The husband had executed and delivered a deed to his wife, keeping the deed among the "family papers."[16] The court stated:

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[7] *Id.* at 741-42. *See* 4 H. TIFFANY, REAL PROPERTY, § 1055, at 251 (3d ed. 1939).

[8] 51 Miss. 146, 153 (1875). *See also* Hall v. Barnett, 71 Miss. 37, 14 So. 732 (1893); Harkreader v. Clayton, 56 Miss. 383 (1879); Morgan v. Hazlehurst Lodge, 53 Miss. 665 (1876).

[9] 60 Miss. 685 (1882).

[10] *Id.* at 688.

[11] *Id.*

[12] Young v. Elgin, 27 So. 595 (Miss. 1900).

[13] 121 Miss. 752, 83 So. 807 (1920).

[14] *Id.* at 761, 83 So. at 808.

[15] *Id.* at 762, 83 So. at 808.

[16] Chapman v. Lott, 144 Miss. 841, 110 So. 793 (1927).

> The formal ceremonial of a manual delivery . . . is not a thing so sacrosanct that no other overt act evidencing a completed intention to convey may be accepted in lieu of the actual delivery into the very grasp of the vendee.[17]

Where a mother executed but did not record a deed to her homestead and placed it in a bank with written instructions not to deliver it to grantee until her death, and she gave grantee a memorandum to show to the bank, the delivery was valid.[18] A father had executed and recorded two deeds, one to each of his sons, stating in the instruments that delivery would not become effective until his death.[19] This reservation by the father that delivery would not become completed until his death was testamentary in nature, and therefore, no title passed.[20] A deed which had been executed in favor of the appellants but which had been kept by a bank in its vault was deemed to have been constructively delivered.[21] In that opinion, it is stated:

> [A] manual delivery of the instrument to the grantee is not always required. Delivery may be constructive as well as actual, and it is sufficient if it is apparent that either from the words or acts of the grantor that it was his intention to treat the deed as having been delivered.[22]

It has been the purpose of the first section of this paper to show that even though there was a general rule of construction, the courts of Mississippi varied that rule to fit the circumstances of each factual situation. The next section will be concerned with two Mississippi cases that, within a four year period, laid down irreconcilable rules of construction.

II. The *Wilbourn-Graham* Problem

The case of *Wilbourn v. Wilbourn*[23] was handed down in 1948. *Graham v. Graham*[24] was handed down four years later. Yet in that space of time, the supreme court reversed itself on very similar facts; and, in so doing, reversed the same Chancellor twice. In both cases the deeds were executed and recorded while the grantees were not present and without their knowledge.[25] In both cases the deeds were made by fathers to sons.[26] The deed was retained by the grantor in each case except for the period in which the chancery clerk recorded it.[27]

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[17] *Id.* at 849, 110 So. at 794.

[18] Ladner v. Moran, 190 Miss. 826, 1 So. 2d 781 (1941).

[19] Palmer v. Riggs, 197 Miss. 256, 19 So. 2d 807 (1944).

[20] *Id.* at 260, 19 So. 2d at 808.

[21] Frederick v. Merchants & Marine Bank, 200 Miss. 755, 28 So. 2d 843 (1947).

[22] *Id.* at 765, 28 So. 2d at 846.

[23] 204 Miss. 206, 37 So. 2d 256 (1948).

[24] 213 Miss. 449, 57 So. 2d 175 (1952).

[25] Graham v. Graham, *supra* note 24, at 450, 57 So. 2d at 175; Wilbourn v. Wilbourn, *supra* note 23, at 210, 37 So. 2d at 257.

[26] Graham v. Graham, *supra* note 24, at 450, 57 So. 2d at 175; Wilbourn v. Wilbourn, *supra* note 23, at 210, 37 So. 2d at 257.

[27] Graham v. Graham, *supra* note 24, at 450, 57 So. 2d at 175; Wilbourn v. Wilbourn, *supra* note 23, at 210, 37 So. 2d at 257.

In the *Wilbourn* case, the mother of the grantee, who had joined in the execution of the deed, burned the deed before it could be manually delivered to the grantee.[28] The deed was either lost or misplaced in the *Graham* case.[29] The grantee in the *Wilbourn* case, upon returning home, took possession of the property by living with the grantor, but the situation proved to be so unpleasant that the grantee was forced to move out.[30]

The *Wilbourn* majority opinion authoritatively set down several rules which appeared to be a departure from the previous general rule and the case law announced previous to that time:

> It is true that later she [the grantee's mother] took the recorded deed from where it was being kept in the home and burned it before the son's return from the war, but she could not thereby destroy the record title which was then *vested* in the son. The delivery of the deed to the clerk and its recordation, under the circumstances, had *not only vested the record title in the son, but also the legal title.* The son could not thereafter divest himself of such title except by executing a conveyance back to the grantor or to someone else.[31] (emphasis added).

The majority went on to say that the grantee could have, if he had desired, conveyed legal title after the time of recordation.[32] The majority again stated that intent to deliver on the part of the grantor had been shown by the placing of the deed for recordation.[33] The concurring opinion of Chief Justice Griffith refutes the argument that recordation is just an offer which is subject to withdrawal.[34] He states that public policy would require that a bill with notice be filed before withdrawal would be allowed.[35]

A very strenuous dissent was written in *Wilbourn*.[36] The principal points of difference with the majority were three in number:

(1) That the mother of the grantee had not authorized the grantor to have the deed recorded or delivered to the grantee;

(2) That the possession and enjoyment of the deeded property had not been removed from the grantor or the grantee's mother;

(3) That the son had refused to accept any deed made to him by the grantor.[37]

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[28] 204 Miss. at 210, 37 So. 2d at 257.
[29] 213 Miss. at 450, 57 So. 2d at 175.
[30] 204 Miss. at 213, 37 So. 2d at 258.
[31] *Id.* at 211, 37 So. 2d at 257.
[32] *Id.* at 212, 37 So. 2d at 258.
[33] *Id.* at 214, 37 So. 2d at 258-59.
[34] *Id.* at 216-17, 37 So. 2d at 260.
[35] *Id.* at 216-17, 37 So. 2d at 260.
[36] *Id.* at 217, 37 So. 2d at 260.
[37] *Id.* at 221, 37 So. 2d at 262.

In answer to this first point, that the mother had not authorized delivery on recordation, the majority stated that she had fully realized that the son would be the recipient of the title, and that by executing the deed she had in fact acquiesced to the passage of title to the son.[38] From the previously quoted material, the majority stated that since the mother had realized this fact, the title had *vested* in the grantee.[39] The dissent's second point, that possession and enjoyment of the property had not changed, was met by the majority by their stating that the grantee moved in with the grantor, but that the experience was so unpleasant that the grantee was forced to move.[40] On point three, that of refusal to accept the deed by the grantee evidenced by a letter to the grantor, the majority stated that the record showed no refusal on the part of the grantee, only that he wished the grantor to do what the grantor thought best.[41] The dissent was strongly against the majority's construing this as adequate acceptance by the grantee:

> [B]ut to make an instrument operate as a conveyance of title, there must be a delivery of the deed by the grantor with intent to thereby pass title to the grantee and *there must be an acceptance of the deed by the grantee with intent that title shall thereby pass to him from the grantor* . . . . This in my humble judgment has been the law in this state for almost a hundred years.[42] (emphasis added).

The dissent also cites two other Mississippi cases to bolster this position.[43]

The case of *Lynch v. Lynch*[44] was also quoted in the dissent for the proposition that there was no legal delivery of the deed from the grantor to the grantee. In *Lynch* the presumption of delivery failed because there was no act showing delivery, only a showing of an intention to to deliver.[45] The majority in *Wilbourn* distinguished the *Lynch* case by saying that sufficient evidence had been presented by the father's testimony to establish delivery.[46] Herein lies the crucial question of constructive delivery of deeds. The *Graham*[47] case reversed the majority opinion in *Wilbourn*[48] by implication. As will be remembered, the

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[38] *Id.* at 211, 37 So. 2d at 257.

[39] *Id.* at 211, 37 So. 2d at 257.

[40] *Id.* at 213, 37 So. 2d at 258.

[41] *Id.* at 214, 37 So. 2d at 259.

[42] *Id.* at 221, 37 So. 2d at 262.

[43] Harkreader v. Clayton, *supra* note 8, at 390, states, "The final and complete act . . . is *delivery*. . . . The grantor must consent that the deed shall pass irrevocable from his control and the grantee must accept it . . . it is equivalent to an actual delivery." Morgan v. Hazlehurst Lodge, *supra* note 8, at 674, where it is stated, "To make the instrument operative there must be delivery by the grantor and acceptance by the grantee. The delivery is the final and complete act; but there can be no delivery without an acceptance."

[44] 121 Miss. 752, 83 So. 807 (1920).

[45] *Id.* at 762, 83 So. at 808.

[46] 204 Miss. at 214, 37 So. 2d at 259.

[47] Graham v. Graham, *supra* note 24.

[48] Wilbourn v. Wilbourn, *supra* note 23.

majority in *Wilbourn* stated that the title had *vested* in the son at the time of recordation.[49] In the *Graham* opinion, *Lynch* is cited as authority for its decision.[50] The major difference between the two cases is that in *Wilbourn* the grantor and the grantee both testified, whereas, in *Graham* only the grantor testified. As was stated in *Graham*:

> Our conclusion does no violence whatever to the decision in the Wilbourn case. In that case the Court clearly recognized the rule laid down in the Lynch case to the effect that the presumption arising from recordation disappears when it is shown that there has been no delivery to the grantee but said "In the case at bar, Appellant [grantee] proved by his father's [grantor] testimony sufficient facts to establish delivery." Quite the contrary is true in the case now before us. The son did not testify and it was established without dispute by the father's testimony that the deed was never delivered and consequently the presumption of delivery arising from recordation of the instrument disappears. The rule in the Lynch case applies to the facts before us . . . .[51]

The grantor in *Wilbourn* testified to the fact that he had the deed executed and recorded to "avoid that impossible situation" of not being able to deliver the deed to the grantee manually.[52] The *Graham* opinion only states what has been quoted at the end of the preceding paragraph. From this, the question still remains, due to the conflict of *Wilbourn* and *Graham*, as to what must be present to have valid constructive delivery of a deed. A study of cases after 1952 suggests the answer.

III. Mississippi Cases after 1952

The case of *Martin v. Adams*[53] concerned a husband-grantor who had executed and recorded a deed of land to his wife as life tenant with his children as the remaindermen. Upon learning of the deed, the wife refused to accept the deed.[54] The court, citing *Lynch* and *Graham*, stated:

> The life tenant [wife], however, declined to accept the deed and there being no delivery to her, there could be no delivery through her for the benefit of the remaindermen. The undisputed proof shows that there was not sufficient delivery and acceptance of the deed by the grantees, and hence the presumption of delivery arising from the recordation of the deed disappears.[55]

McMillan v. Gibson[56] was a case concerning the delivery of deeds

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[49] 204 Miss. at 211, 37 So. 2d at 257.
[50] 213 Miss. at 450, 57 So. 2d at 175.
[51] *Id.* at 451, 57 So. 2d at 176.
[52] 204 Miss. at 212, 37 So. 2d at 258.
[53] 216 Miss. 270, 62 So. 2d 328 (1953).
[54] *Id.* at 277, 62 So. 2d at 329.
[55] *Id.* at 278, 62 So. 2d at 329.
[56] 222 Miss. 408, 76 So. 2d 239 (1954).

to two sisters, the appellant and appellee here. After the deeds were executed and acknowledged, the grantor handed the deeds to the appellant who then returned them to the grantor to be recorded.[57] After distinguishing *Lynch*, the court stated:

> The only fact in this case that would tend to overcome the proof of manual delivery . . . arising from the recordation of the deed is the fact that Mrs. McMillan [appellant] handed the deed back to Wyatt [grantor] who, after having it recorded, kept the deed until his death. Where a deed which has been duly signed and acknowledged is subsequently found in the possession of the grantor, a presumption arises that it was never delivered . . . the mere fact of the grantor retaining possession of the instrument does not render it invalid for want of delivery, if he intended that it should be delivered.[58]

In *Farmer v. Runnels*[59] there was a question of delivery from the grantor-father to the grantee-son of one-half interest in a 295 acre tract of land. There appeared to be two facts in evidence that overcame the presumption of constructive delivery:

> The deed was retained by the grantor until his death . . . . This retention of the deed by the grantor raises a presumption that it was never delivered . . . . There was no evidence to overcome this presumption . . . . Moreover, the grantee, . . . never asserted any title to the one-half interest . . . [and] made statements to several people clearly indicating that he did not claim any interest . . . .[60]

A similar presumption of non-delivery was held not to arise in *Seab v. Seab*.[61]

IV. Conclusion

The question has come to this: What is the effect of *Wilbourn v. Wilbourn*[62] after *Graham v. Graham*?[63] Was the decision in *Wilbourn* just a sojourn by the Mississippi Supreme Court, or was it meant to be the precursor of a trend in the law of deeds? It appears that only *Wilbourn* stands for the rule that legal title *vests* in the grantee at the time of recordation. The body of case law seems to be to the contrary. However, *Graham* stated:

> Our conclusion does no violence whatever to the decision in the Wilbourn case.[64]

Even with the pronouncements in *Graham*, the inescapable conclusion is that *Wilbourn* applies only to its own set of facts. The rule

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[57] *Id.* at 412, 76 So. 2d at 240.
[58] *Id.* at 413, 76 So. 2d at 240-41.
[59] 244 Miss. 525, 142 So. 2d 198 (1962).
[60] *Id.* at 529-30, 142 So. 2d at 200.
[61] 203 So. 2d 478 (Miss. 1967).
[62] Graham v. Graham, *supra* note 24.
[63] Wilbourn v. Wilbourn, *supra* note 23.
[64] 213 Miss. at 451, 57 So. 2d at 176.

of constructive delivery of deeds in Mississippi is clearly this: A presumption of delivery arises when there is execution, recordation, and the presence of the requisite intentions of delivery by the grantor and acceptance by the grantee. The force of any rule which deviates from the statement of the rule set out above must be greeted with skepticism.

Hugh Carter Clayton

WILLS—ABATEMENT OF WILLS

Introduction

When a person writes a will, he always expresses his intent for distribution of his property. Unfortunately, at the time of his death his estate may be insufficient to provide all of the gifts in the manner he intended. When the estate is inadequate to make the bequests as the testator intended, the gifts will be reduced through the process of abatement. The fundamental problem of abatement is determining which gifts will be made and which will give way to the payment of legacies and debts. This note will show the general order of abatement in Mississippi, giving special attention to the state's antiquated treatment of devises.

I. Classes of Legacies

For centuries courts have given great weight to the classification of legacies. In many cases the suit will turn on how a bequest is classified.[1] Because of the use of these terms in Mississippi cases on abatement, it will be helpful to consider how Mississippi classifies legacies.

A. *Specific Legacies*

A specific legacy is a gift of a particular thing, separate and apart from the rest of the estate.[2] The courts are reluctant to declare a gift as being specific and will do so only if the intention can be gathered from the will that the testator intended to burden a specific fund with a specific gift or a particular thing. Under these circumstances only will legacies be declared to be specific.[3] Examples of specific legacies are life insurance policies, specific shares of stock, and specific debts.[4] Some jurisdictions have held that the use of the word "my," as in "my stock" or "my car," indicates the testator's intent to make the gift specific.[5]

B. *General Legacies*

A general legacy is a gift of a quantity of something, payable out of the general assets of a testator's estate. It is not in any way separate or distinguished from other things of like kind.[6] A pecuniary legacy is

[1] T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 731 (2d ed. 1953).

[2] Malone v. Mooring, 40 Miss. 247 (1866).

[3] Gilmer v. Gilmer, 151 Miss. 33, 117 So. 830 (1928).

[4] ATKINSON, *supra* note 1, at 732.

[5] *Id.* at 733.

[6] Gilmer v. Gilmer, *supra* note 3.

always a general bequest unless the testator explicitly states that it is specific.[7] "A gift of $100" is a general bequest, but "the $100 bill in safety deposit box 139" is specific. A bequest of stock is general unless the testator designates certain stock as distinguished from all other stock.[8] The testator's gift of "ten shares of stock in the Growing Fast Corporation" is general, but a gift of "all the stock which I own on July 4, 1960 in the Growing Fast Corporation" is specific. A gift of bonds to be paid out of the general estate is also a general legacy.[9]

C. *Demonstrative Legacies*

A demonstrative legacy has characteristics of both a general and a specific legacy. It is a money gift charged on a specific fund and directed to be paid out of that fund.[10] This legacy gets maximum protection: if the specific fund fails, it is paid from the general estate; if there is a deficiency of assets, it will not abate until the specific legacies abate.[11] Examples of demonstrative legacies are an annuity paid from a specific fund[12] and a bequest of a certain sum of money to be paid out of the sale of specified lands.[13]

D. *Residuary Legacies*

A residuary legacy is payable from a general fund consisting of all of the testator's property not given in some other manner.[14] An example of a residuary clause setting up a general residuary fund is the following: "I give, devise and bequeath all the remainder of my property, real and personal, after the above legacies are fully paid."[15] One can easily see that this type of legacy is the most general of all because it is not determined until all other legacies have been paid.

II. Abatement of Legacies

When an estate consists totally of personalty, there is no Mississippi statute indicating an order of abatement. The court looks to the case law and to the intent of the testator to provide a method of abatement.

A. *Intention*

When abatement is necessary, the court will first attempt to determine the testator's intent.[16] If the will expressly indicates the order of abatement, this plan will be followed even if it departs from the normal order provided by law.[17] It is not necessary that a complete order of abatement be given. The statement "I direct that the foregoing legacies

[7] Vaiden v. Hawkins, 59 Miss. 406 (1882).

[8] Gilmer v. Gilmer, *supra* note 3.

[9] Chrisman v. Bryant, 108 Miss. 311, 66 So. 779 (1914).

[10] Gidden v. Gidden, 176 Miss. 98, 167 So. 785 (1936).

[11] Malone v. Mooring, *supra* note 2.

[12] Perkins v. First Nat'l Bank of Yazoo City, 81 Miss. 358, 33 So. 18 (1902).

[13] Hailey v. McLaurin's Estate, 112 Miss. 705, 73 So. 727 (1917).

[14] Oliphant v. Skelton, 230 Miss. 518, 93 So. 2d 181 (1957).

[15] Heatherington v. Lewenberg, 61 Miss. 372 (1883).

[16] Howell v. Ott, 182 Miss. 252, 180 So. 52 (1938).

[17] Benton v. Friar, 171 Miss. 361, 157 So. 356 (1934).

shall have priority and be given in full" was sufficient to indicate the testator's intent to protect preferred legacies from abatement.[18] It should be noted that even though the will speaks at the time of the testator's death, his intent is manifested when the will is written:[19] when the testator intends for certain property to pass unincumbered at the time the will is written, it passes free from debts made thereafter.

B. *Order of Abatement*

If the testator fails to express his intent as to the order of abatement, his estate will abate according to law. There is no Mississippi statute establishing an order of abatement among legacies, but the case law establishes the following order: (1) intestate property[20] (if there is a general residuary clause, there will be no intestate property), (2) residuary legacies,[21] (3) general legacies,[22] (4) demonstrative[23] and specific legacies.[24] When the estate is insufficient to pay all the debts and legacies, the first property which is used to satisfy these claims is the intestate property, or if there is a residuary clause, the residuary property is used. If this fund is exhausted before the debts are paid, the general legacies are called on to pay their part. The general legacies must completely abate before any of the demonstrative or specific legacies are used. (A demonstrative legacy is treated the same as a specific legacy until the fund from which it is to be paid expires. If this fund expires, the legacy will be general.)[25] When all other property is gone, the specific legacies are abated.

In order to aid in understanding how abatement affects personalty, the following examples are given: (1) Horatio Hornblower dies testate leaving a $35,000 total estate consisting of personal property only. His will provides $10,000 in residuary legacies, $20,000 in general legacies and $5,000 in specific legacies. He had debts of $15,000 at death. The first property which abates for payment of the debts is the residuary. After the $10,000 is taken from this fund, $5,000 is left to be taken from the second source, the general fund. When all debts are paid, the result is no property in the residuary; the general estate is reduced from $20,000 to $15,000; and the specific legacies remain untouched at $5,000. (2) Using the same example, assume that the debts total $31,000. This causes the $30,000 of residuary and general funds to be totally exhausted, leaving $1,000 to be paid by the specific legacies. (Once the debts are paid, there is only $4,000 left in the estate consisting entirely of specific legacies.)

III. Abatement of Devises

In Mississippi devises are held on a pedestal protected from abatement by the entire personal estate.[26] Because of this archaic view toward

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[18] *Id.*

[19] Riegelhaupt v. Ostroffsky, 237 Miss. 521, 115 So. 2d 331 (1959).

[20] Temple v. First Nat'l Bank of Meridian, 202 Miss. 92, 30 So. 2d 605 (1947).

[21] Gordon v. James, 86 Miss. 719, 39 So. 18 (1905).

[22] *Id.*

[23] Malone v. Mooring, *supra* note 2.

[24] Gordon v. James, *supra* note 21.

[25] Malone v. Mooring, *supra* note 2.

[26] Gordon v. James, *supra* note 21.

realty, the testator's unexpressed intent[27] is often ignored, leaving general and residuary devises protected when specific legacies are reduced or totally depleted.

A. *Order of Abatement*

Section 539 of the Mississippi Code states that the lands of the testator are chargeable with the debts of the estate "over and above what the personal estate may be sufficient to pay . . . ."[28] In *Gordon v. James*, the Mississippi Supreme Court interpreted the statute as stating that when abatement is necessary the entire personal estate must be exhausted before any portion of the lands can be sold and the proceeds used.[29] The *Gordon* interpretation of the statute has been firmly established by a long line of cases dating from 1905 until the present day.[30]

B. *Intent*

Again it should be emphasized that the testator's intent will be given first consideration. There are two situations[31] in Mississippi where the court has allowed realty to be charged with payment of legacies even though the testator did not expressly state that it should be so charged.

The first of these exceptions to the general rule is stated in *Stuart v. Robinson*.[32] The testatrix died two days after making her will. She made specific devises and legacies of all her estate knowing that she had no money to pay the legacies. She did have considerable real estate which had all been specifically devised. The question presented was whether the real estate could be sold to pay the legacies. The court held that it could because it could not be supposed that the testatrix on her death bed intended to perpetrate such a ghastly joke.

The other exception occurs when the testator uses a mixed residuary clause consisting of both realty and personalty. In *Knotts v. Bailey*,[33] the Mississippi Supreme Court stated that where the testator blends his real estate in with other property, he expresses an intent to charge the land with payment of bequests. The testator left certain lands to his wife and a $500 legacy to a servant. The rest of the land was included in the clause "all the rest of my estate, of any sort whatsoever, that I may die possessed of, be distributed . . . ." Query: Could real estate included in the residuary clause be sold to pay the $500 legacy? As stated above, the court held that by blending his real estate in with other property the testator expressed an intent to charge a be-

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[27] The testator's written intent will always be followed. Benton v. Friar, *supra* note 17.

[28] MISS. CODE ANN. § 539 (1956).

[29] Gordon v. James, *supra* note 21.

[30] Gidden v. Gidden, *supra* note 10; Kent v. McCaslin, 238 Miss. 129, 117 So. 2d 804 (1960); Gaines v. Klein, 203 Miss. 271, 34 So. 2d 489 (1948).

[31] Under MISS. CODE ANN. § 586 (1956) real property can be sold before personal property if the court is convinced that it is in the best interests of all the beneficiaries. Temple v. First Nat'l Bank of Meridian, *supra* note 20.

[32] Stuart v. Robinson, 80 Miss. 290, 31 So. 903 (1902).

[33] Knotts v. Bailey, 54 Miss. 235 (1876).

quest of money on the land. During the period from 1876 until 1902, several cases followed establishing the *Knotts* rule.[34] Since *Perkins v. Bank*[35] in 1902, there have been no cases decided on this point, but in 1905, when *Gordon* held that all personalty must abate before any realty may be used, the court seemed to recognize the mixing and blending rule by certain statements in the dicta.[36]

IV. Abatement between Legacies and Devises

Where the will provides for legacies only, abatement is simple; but when devises are also present, the problem becomes more complicated. In order to summarize the order of abatement in Mississippi, the following examples are helpful. Assume that our friend Horatio died testate leaving both real and personal property totaling $90,000 in the following manner:

	Personalty	*Realty*
Specific	$ 5,000	$15,000
General	20,000	30,000
Residual	10,000	10,000
Total	$35,000	$55,000

If Horatio neither expressed an order of abatement nor commingled his realty and personalty in the residuary, debts totaling $35,000 would have the following effect on his estate. First the $10,000 of residuary legacies would be taken; next the $20,000 in general legacies would abate; and finally the $5,000 in specific legacies would be used to pay the debts, leaving the realty untouched at the total expense of the personalty.

For further illustration assume that the estate has a total of $50,000 in debts. Once again all of the personalty abates, contributing $35,000. The realty is then called on to pay the remaining $15,000. The residuary realty first yields its $10,000, leaving a $5,000 obligation on the general realty. When the total debt is paid, there is no personalty left and no residuary realty. The general realty is reduced to $25,000, and the specific realty is left intact at $15,000.

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[34] Perkins v. First Nat'l Bank of Yazoo City, *supra* note 12; Heatherington v. Lewenberg, *supra* note 15; Peebles v. Acker, 70 Miss. 356, 12 So. 248 (1892); Turner v. Turner, 57 Miss. 775 (1880).

[35] Perkins v. First Nat'l Bank of Yazoo City, *supra* note 12.

[36] Gordon v. James, *supra* note 21. In *Gordon* the realty and personalty were not commingled, but the court implied in the following quotations that if they had been commingled the residuary realty and personalty would have abated together:

". . . [U]nless the will contains evidence of manifest intent on his part to commingle land and personalty, the personal estate must, as in the case of intestacy, be first exhausted before any portion of the lands can be used.

"In the case of a general legacy or bequest not charged on the realty, in an estate which the land and personalty were not commingled by the testator, if necessary for the payment of debts, the general legacy would have to abate, even to the extent of obliteration, before any deduction could be made from the devise."

Conclusion

If people would begin to establish a plan of abatement in their wills, there would be no problem, because the courts are always willing to follow the testator's intent if it is clearly stated. When the testator fails to express his intent, the court must decide how to abate the estate. The order of abatement will be based on the classification of the property if the estate is entirely realty or personalty, but when both realty and personalty are present, the entire personal estate will abate before even the residuary realty is used. However, Mississippi stubbornly clings to the idea that real estate should be protected even if all the rest of the property must abate to pay for this protection. This practice originated in England when property was the basis of that country's economy. It was adopted in Mississippi in the nineteenth century when land was valued above all other property in this state. But does the average testator today value his real property above all his other property? *Atkinson on Wills* states that when a testator makes gifts of different classes the court should interpret such an act as the testator's implied direction that realty and personalty should be treated equally within a given class.[37] The *Model Probate Code* also states that there should be no preference for realty over personalty.[38]

Unfortunately, Mississippi shows no indication of a desire to change its law of abatement. For this reason it is necessary to take special note of the problems that may be encountered. There are two steps a testator may take in protecting his estate. The first and most important is to be sure his chosen plan of abatement is clearly stated in the will. Secondly, if he intends for his residuary realty and personalty to be treated the same, he should be sure to blend them together in a residuary clause.

Ernest G. Taylor, Jr.

Water Pollution Control in Mississippi

Introduction

The pollution of fresh water sources is rapidly becoming one of the foremost problems of the affluent society that now exists in the United States. An ample supply of usable water has been one of our most important natural resources, but it is one which is now on the verge of becoming our "most critical natural resource."[1] The crisis in the water pollution area has been brought about by various causes,[2] but the tremendous growth in population, industry and agriculture is probably the foremost factor in the problem. By the year 2000, the urban population of the United States is expected to be double that of today,[3] while it is predicted that by 1975 industry will double the production

[37] Atkinson, *supra* note 1, at 761.

[38] Model Probate Code § 184(a) (1945).

[1] Stein, *Problems and Programs in Water Pollution*, 2 Natural Resources J. 388 (1962).

[2] *Id.* at 390-91.

[3] *Id.* at 393.

it attained in 1950.[4] Increased sewage and increased industrial wastes accompany population and industrial growth. In the area of agriculture, commercial farming of over 30 million acres of land which are treated with fertilizers, pesticides and herbicides has created a great source of pollution in the form of contaminated silt and residue.[5] Because of this increase in pollution, experts are in agreement that for the foreseeable future *re-use* of existing fresh water "is the key to satisfying the water demands of the nation."[6]

Re-use of water demands that certain levels of water quality be maintained.[7] The question of just how high the standards for quality of water should be set seems to be more of a political and economic problem than a technological one. The technical ability to remove most of the pollutants from water has been developed, but what has been lacking in the past is a strong will on the part of elected officials to implement pollution control programs and the financial support to carry out the programs.[8] To compound the problem, polluters have little natural motivation to cease discharging harmful wastes into fresh water sources. They continue to pollute because it is easier and much less expensive just to dump their wastes into a stream than it is to install the equipment required for cleaning up their effluent. The *law*, therefore, must prescribe punishments for pollution that will be adequate to supply the necessary incentive for treatment of wastes. The purpose of this paper is to discuss the legal methods, both common law and statutory, which can be used to control or abate water pollution in Mississippi.

I. Common Law Remedies

A. *Damages*

It is a well settled rule of law that every riparian owner has the right to have the stream flowing through his land to be free from pollution and in its natural condition of purity.[9] Under the common law this was not, however, an absolute right to be immune from all pollution. A riparian owner could pollute the stream if such pollution did not materially affect the rights of the lower riparian owner[10] or if he had acquired a right to pollute by prescription.[11] The action usually

[4] *Id.* at 398.

[5] Hines, *Nor Any Drop to Drink: Public Regulations of Water Quality. Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 193 (1966).

[6] *Id.* at 188.

[7] *Id.*

[8] Delogu, *Effluent Charges: A Method of Enforcing Stream Standards*, 19 ME. L. REV. at 29-30 (1967).

[9] Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954); 93 C.J.S. *Waters* § 43 (1956).

[10] 93 C.J.S. *Waters* § 43 (1956).

[11] In Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1892), the court held: "[T]he right secured by prescription was limited by the *character* and *extent* of that exercised during the period of prescription, and that for any increase causing material injury an action could be brought." *Id.* at 306, 11 So. at 27. *See also* Southland Co. v. Aaron, *supra* note 9; City of West Point v. Womack, 178 Miss. 808, 174 So. 241 (1937); Harvey v. Illinois Cent. R.R., 111 Miss. 835, 72 So. 273 (1916).

brought to have pollution abated or controlled is based on the theory of nuisance;[12] and, as a general rule, riparian owners are the only persons entitled to relief.[13] The relief granted in private actions is in the form of damages, injunction, or criminal prosecution.

Damages is the relief which is sought in the majority of cases concerning water pollution. This relief is of three different types—compensatory, punitive, or special—and it may include either or all types. Compensatory damages which are given for actual injuries to the land are determined in two ways. If the injury to the land is permanent in nature then the proper measure of damages is the difference in the market value of the land before and after the injury.[14] If, however, the injury is temporary in nature then the proper measure of damage is determined by the rental value of the land.

Perhaps the foremost Mississippi case in this area is *Southland Co. v. Aaron*.[15] Aaron was a landowner who had a creek flowing through his property. Southland owned an oil refinery which dumped effluent into the creek. It was alleged by the plaintiff that before the defendant built its plant the creek water was clean, wholesome, and healthful. It was also a good source for swimming, fishing, and for watering cattle. Aaron claimed that the water had been polluted by the defendant and asked for damages for depreciation in the market value of his land and for the loss of his water supply, swimming facilities, and fishing rights. There had been no actual damage to the land, and it was found that there would be only temporary injury. After stating the general rule as to permanent damages, the court went on to say:

> Under these circumstances the measure of damages which the plaintiffs were entitled to recover, if any, was the depreciation in the *rental value,* or the depreciation in the value of the *use* of the property, during the two-year period, and such special damages as the plaintiffs may have been able to prove.[16] (emphasis added).

The 1957 case of *Magnolia Petroleum Co. v. Stinson*[17] arose because of pollution of a stream which resulted from an overflow from Magnolia's drilling operation. Stinson's sheep which drank the water died and aborted from poisoning. In determining the proper measure of damages, the court stated:

> Veterinary services and the cost of medical treatment and attention, the value of livestock killed, aborted lambs, and the depre-

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[12] City of Meridian v. Tingle, 226 Miss. 317, 84 So. 2d 388 (1956); City of Oxford v. Spears, 228 Miss. 433, 87 So. 2d 914 (1956); Southland Co. v. Aaron, *supra* note 9; American Sand and Gravel Co. v. Rushing, 183 Miss. 496, 184 So. 60 (1938); 93 C.J.S. *Waters* § 43 (1956).

[13] Southland Co. v. Aaron, *supra* note 9; Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292 (1933); 93 C.J.S. *Waters* § 51 (1956).

[14] Ginther v. Long, 227 Miss. 885, 87 So. 2d 286 (1956); 56 Am. Jur. *Waters* § 422 (1947).

[15] Southland Co. v. Aaron, *supra* note 9.

[16] *Id.* at 75-76, 72 So. 2d at 167.

[17] 230 Miss. 533, 93 So. 2d 815 (1957).

> ciation in weight or in the value of livestock injured may be taken into consideration in determining damages from the pollution of a stream.[18]

Further, in the case of *Love Petroleum Co. v. Jones*[19] recovery was permitted for pollution of a stream which killed the trees growing along the stream bank and the fish in the water.

Special damages incurred as a result of water pollution were granted in *City of Oxford v. Spears*.[20] The plaintiff alleged that Oxford maintained a nuisance by discharging raw sewage into a watercourse that ran through his land. The pollution rendered the water unfit for cattle to drink, and it emitted offensive odors. Damages were claimed for the loss of profits from being forced to go out of the cattle business. The court held that the evidence was ample to justify the fact that the city maintained a nuisance and that Spears was entitled to recover damages, but that loss of profits was not the proper measure. The proof showed that this was an abatable nuisance which did not constitute a permanent injury, so the measure of damages was the depreciation in rental value:

> In addition, the landowner is entitled to recover such special damages as he may be able to prove. These special or incidental damages are elements of damage separate, distinct, and independent of the depreciation of the value of the property or of the depreciation of the rental or usable value of the property. Included in the category of special or incidental damages are annoyance, discomfort, inconvenience, and sickness.[21]

Special damages for "personal inconvenience and danger to the health of himself and family" were also recovered by the plaintiff in *City of Meridian v. Tingle*.[22]

An example of the other type of damages that can be recovered is brought out in *Southland Co. v. McDonald*.[23] Southland emptied its effluent into a creek which flowed through McDonald's land. The polluted water ruined some pastureland and injured some cattle. McDonald notified Southland of the situation and requested that the defendant cease polluting the stream, but the defendant paid no attention to McDonald's pleas. As a result, the award of actual and punitive damages was upheld by the Mississippi Supreme Court.

Another important Mississippi case concerning damages for pollution of a stream is *Masonite Corp. v. Burnham*.[24] Burnham alleged offensive odors, creation of a breeding place for mosquitoes, and damage to his land. The lower court held for the plaintiff, but the Mississippi Supreme Court reversed because it said the plaintiff was not a riparian owner. The defendant and the city of Laurel both discharged effluents into the creek, and it was shown that the city had purchased the right

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[18] *Id.* at 545, 93 So. 2d at 820.

[19] 205 So. 2d 274 (Miss. 1967).

[20] City of Oxford v. Spears, *supra* note 12.

[21] *Id.* at 439, 87 So. 2d at 916.

[22] City of Meridian v. Tingle, *supra* note 12, at 323, 84 So. 2d at 391.

[23] 225 Miss. 19, 82 So. 2d 448 (1955).

[24] Masonite Corp. v. Burnham, *supra* note 13.

to do so from the previous owner of the land. When Burnham argued that he did not know of the pollution when he bought the land the court replied that any right of action which the grantor might have had did not pass to the grantee with the conveyance. The court said further that if the defendant increased its pollution thereby causing a further depreciation of the value of the land, then the plaintiff would be entitled to recover for such additional depreciation after purchase.

B. *Injunction*

Another common law remedy which is available to a plaintiff who is harmed by water pollution is an injunction. This is the proper remedy to prevent threatened pollution or to stop further pollution.[25] The "balancing of injuries" doctrine, under which the amount of injury done is the prime factor in determining whether or not an injunction should be granted, is the guide most frequently used by courts in injunctive relief cases.[26] However, according to dicta in *Southland Co. v. Aaron*,[27] the Mississippi rule would seem to be that the plaintiff's right should not be invaded regardless of how minor the degree of harm he suffered, provided some real injury is suffered. In *Aaron* the court, in quoting American Jurisprudence, pointed out that:

> [I]t is the generally accepted doctrine that a riparian owner sustaining substantial injuries by reason of such an invasion of his rights may maintain an action without regard to the motive which prompts the invasion, and the pollution of a stream to the injury of a lower proprietor *will not be justified by the importance of the business of the upper proprietor* to either the public or the wrongdoer, or by the fact that the latter is conducting such business with care and in the only known practicable mode.[28] (emphasis added).

C. *Criminal Action*

The other type of common law remedy available to a plaintiff in a water pollution case is a criminal action. The general rule in this area is that "[o]ne who pollutes a watercourse is liable to criminal prosecution where the pollution constitutes a public nuisance, or under statutes prohibiting the contamination or befouling of watercourses."[29] There are three such statutes under which this type of action can be instituted in Mississippi.[30] However, as of the writing of this article, there are no reported cases of criminal prosecution.

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[25] 93 C.J.S. *Waters* § 55 (1956).

[26] Knodell, *Liability for Pollution of Surface and Underground Waters*, 12 ROCKY MT. MIN. L. INST. 33, 77 (1967).

[27] Southland Co. v. Aaron, *supra* note 9.

[28] *Id.* at 72, 72 So. 2d at 165.

[29] 93 C.J.S. *Waters* § 57 (1956).

[30] MISS. CODE ANN. § 2414 (1956) prohibits pollution of a stream by depositing dead animals "or any refuse or foul matter, or any matter or thing calculated to render the water thereof less fit for drink, or the sustenance of fish. . . . " MISS. CODE ANN. § 2415 (1956) prohibits creosoting plants and sawmills from dumping their wastes into streams. MISS. CODE ANN. § 2415.5 (Supp. 1968) prohibits the felling of trees into running streams.

D. *Obstacles to Winning a Water Pollution Case*

Private actions have generally proven incapable of effectively abating or controlling pollution on a large scale.[31] One writer has explained the reasons as follows:

> The privately initiated suit is subject to three crippling weaknesses: (1) the plaintiff often cannot prove that one particular polluter caused his injuries, and some state courts have forbidden joinder of several polluters in the same action; (2) the equity courts do not have sufficient expertise to draw an injunction that specifically sets forth the manner in which the pollution is to be abated; and (3) the case by case method of determination inherent in the judicial process can never achieve a comprehensive program of pollution control.[32]

Other fundamental difficulties involved in seeking judicial redress for harm caused by pollution are persons affected by the pollution may not be riparian land owners and, thus, may not have "standing" to sue; the plaintiff must have suffered a material injury and the harm must be different from that suffered by the public in general;[33] the plaintiff must establish by direct evidence the causal connection between defendant's operation and his injury;[34] and, in the case of public nuisances, public officials who have the responsibility for abating pollution are sometimes reluctant to carry out this responsibility.[35]

II. Legislative Enactments

Because of the failure of the common law remedies to effectively control the onslaught of water pollution on a broad scale throughout the United States, statutory controls had to be implemented. These governmental statutes have been enacted on both the federal and state levels, and although the common law remedies are still available, the enforcement agencies of the different states are now the chief adversaries of water pollution.

A. *Federal Law*

In 1948, the Federal Water Pollution Control Act[36] was passed by Congress in an effort to curb rising water pollution trends. The act, however, left the responsibility for pollution control to the different states,[37] and no federal standard of uniformity was required. Thus, water pollution steadily increased from 1948 to 1965.[38] Then, in 1965, the act

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[31] Hines, *supra* note 5, at 195.

[32] Note, *Water Pollution—State Control Committee*, 17 VAND. L. REV. 1364, 1366 (1964).

[33] Hines, *supra* note 5, at 197.

[34] Knodell, *supra* note 26, at 63.

[35] Hines, *supra* note 5, at 198.

[36] 33 U.S.C. §§ 466—466k (1948).

[37] 33 U.S.C. § 466g(b) (1948).

[38] P. WILLIAMS, L. MCDOUGAL & W. CHAMPION, THE LAW OF WATER POLLUTION CONTROL 5 (1967) [hereinafter cited as Williams].

of 1948 was amended by the Water Quality Act[39] which adopted and required a federal standard of water quality for all states to meet.[40]

B. *State Law*

That the primary responsibility for controlling water pollution is in the hands of the different states is made clear by the declaration of policy of the Water Quality Act.

> [I]t is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution.[41]

When the Water Quality Act of 1965 was passed by Congress, Mississippi had an assortment of pollution laws in force. These laws fell generally into three categories: (1) penal statutes prohibiting specified acts of pollution, (2) statutes giving some existing agency limited pollution control authority, and (3) statutes applying to a single stream or basin.[42] There was one rather broad law in force in Mississippi at the time the new federal act was passed in 1965.[43] The Mississippi Game and Fish Commission, which was the enforcement agency under the act,[44] was given broad pollution control power in that it could formulate rules and regulations to protect the purity of the waters of the state, prescribe standards of purity for wastes from waste treatment plants,[45] and bring an appropriate action in court in the name of the state.[46] To facilitate carrying out its enforcement powers, the Commission had the right to enter private or public property to investigate conditions relating to pollution.[47] Perhaps the single most important provision of the act was that concerning the "permit system," about which has been said:

> Potentially, one of the most effective techniques for control of water pollution is a permit system under which discharges of wastes into any waters of the states are prohibited except as permitted by the agency after examination of plans, specifications and other data. Through this means the agency can either prohibit discharges altogether or condition their approval on treatment adequate to protect legitimate water uses.[48]

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[39] 33 U.S.C. §§ 466—466n (Supp. IV, 1965).
[40] 33 U.S.C. § 466g (Supp. IV, 1965).
[41] 33 U.S.C. § 466 (b) (Supp. IV, 1965).
[42] Williams, *supra* note 38, at 8.
[43] Miss. Code Ann. §§ 5929-01 to -17 (1952).
[44] Miss. Code Ann. § 5929-02 (1952).
[45] Miss. Code Ann. § 5929-04 (1952).
[46] Miss. Code Ann. § 5929-05 (1952).
[47] Miss. Code Ann. § 5929-06 (1952).
[48] Stein, *supra* note 1, at 406.

After issuance of the permit, the Commission was under a duty to investigate from time to time the operation of such treatment works, and if everything was in order a certificate of compliance was to be issued. If the treatment facilities were not operating within the limits of the permit, then the permit could be cancelled.[49]

Two interesting cases have arisen concerning the certificate of compliance provision of the act. Both involve the same defendant and both were decided in 1955. In *Masonite Corp. v. Guy*[50] the plaintiff alleged that effluent from the defendant's operation had killed his fish and minnows. Masonite sought to use as a defense a certificate of compliance issued by the Mississippi Game and Fish Commission. It was contended that the certificate was conclusive evidence that the defendant did not pollute the stream in 1950 and 1953. The court held that the certificate did "not grant a perpetual license to violate its agreement with immunity . . . ."[51] Guy recovered damages from the defendant. In *Massey v. Masonite Corp.*[52] the plaintiff sued for damages to a privately owned lake caused by pollution from defendant's operation. Masonite again sought to use a certificate of compliance issued by the Commission as a bar to the action against it. Defendant alleged that the certificate was conclusive evidence for all purposes that the effluents discharged would not be injurious to aquatic life or to public health. The trial court granted summary judgment in favor of the defendant on the basis of the certificate. In reversing, the Mississippi Supreme Court said that "a certificate of compliance . . . is not a legal bar to a private suit for damages for the pollution of a privately owned lake."[53]

After passage of the federal Water Quality Act, the Mississippi legislature enacted the Mississippi Air and Water Pollution Control Act of 1966.[54] Under this act, the Mississippi Air and Water Pollution Control Commission was created[55] with the primary responsibility of overall pollution regulation and control for the state.[56] The powers and duties of the Commission are many and varied, but the two most important ones are the power to adopt standards of quality for all waters of the state and the power to issue permits for disposal of wastes and to revoke the permits for noncompliance.[57] The Mississippi Game and Fish Commission was again designated as the enforcement agency of the Commission.[58] Another important improvement over the previous act is the inclusion of municipalities from the requirements concerning adequate standards of water quality.[59]

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[49] MISS. CODE ANN. § 5929-07 (1952).
[50] 223 Miss. 8, 77 So. 2d 720 (1955).
[51] *Id.* at 14, 77 So. 2d at 722.
[52] 219 F.2d 586 (5th Cir. 1955).
[53] *Id.* at 587-88.
[54] MISS. CODE ANN. §§ 7106-111 to -136 (Supp. 1968).
[55] MISS. CODE ANN. § 7106-113 (Supp. 1968).
[56] MISS. CODE ANN. § 7106-115 (Supp. 1968).
[57] MISS. CODE ANN. § 7106-116 (Supp. 1968).
[58] MISS. CODE ANN. § 7106-115 (Supp. 1968).
[59] MISS. CODE ANN. § 7106-119 (Supp. 1968).

Conclusion

After many years of total indifference by the majority of Americans, interest in the water pollution control problem has finally emerged. This has been due to several factors: (1) federal governmental action by way of pollution control laws which are strict and affirmative in nature, (2) state action by way of pollution control laws passed in conformity with the federal laws, (3) public indignation at the rising amount of filth and ugliness caused by water pollution, and, (4) the never-ending crusade of several individual conservationists and persons who take a genuine interest in the problem. As a result of this growing interest, the trend in favor of pollution which for many years went unchecked is now being reversed, and the battle for pure waters is gaining momentum.

In general, the new federal and state anti-pollution laws are, or could be, very effective in controlling water pollution. But creating potentially effective pollution control laws is not the same thing as actually cleaning up the waters. If these laws are to be effective they must be strictly enforced at both the federal and state levels. Herein lies a patent defect of the new Mississippi law—the appointment of the Mississippi Game and Fish Commission as the enforcement agency. The Commission is not a pollution control agency. It has enough problems in administering the wildlife laws of the state without having to enforce pollution laws. Since the legislature saw fit to create an independent pollution control commission for the state, it should have gone one step further and created the commission's own enforcement arm. Enforcement of the law at this time without further delay is essential to the success of a long range plan of water pollution control.

In summary, it would be correct to say that Mississippi now has the statutory power to control water pollution. With strict enforcement of the Mississippi Air and Water Pollution Control Act of 1966 and with help from the different polluting factions and the public, the comprehensive water pollution control program now in effect can overcome the mistakes made earlier in this field.

Roger T. Clark

Property—The Weakest Link in the Chain?

The common law maxim *Nullus commodum capere potest de injuria sua propria*—no one should be allowed to profit by his own wrong—has been recited by innumerable courts down through the years when they have sought to adjudicate cases involving the question of whether or not one who feloniously kills another should be allowed to acquire property from the victim in consequence of the latter's death. Without benefit of statutory direction in the matter, these courts have adhered to one of the following three views:

(1) The killer could take the property in spite of his wrongful act. This view, the one-time majority view in the United States, was founded on the theory that courts of law had no power to modify or change what

the state legislature had proclaimed to be the method of descent and distribution of property.[1]

(2) No title will pass to the slayer.[2] This later became the majority view and incorporated an exception engrafted onto the statutes of descent and distribution which was often termed "unwarranted judicial legislation."[3]

(3) The title to the property will pass to the killer, but equity will hold him to be a constructive trustee for the heirs or next of kin of the decedent.[4]

In an attempt to remedy this troublesome subject, many states adopted legislation which tended to alleviate, in varying degrees, the difficulties posed by diverse factual situations within the broad problem category of whether or not a felonious slayer may acquire property from his victim.[5] The pertinent Mississippi statutes provide that:

> If any person wilfully cause or procure the death of another in any way, he shall not inherit the property, real or personal, of such other; but the same shall descend as if the person so causing or procuring the death had *never been in being.*[6] (emphasis added).

> If any person shall wilfully cause or procure the death of another in any manner, he shall not take the property, or any part thereof, real or personal, of such other, under any will, testament, or codicil; any devise to such person shall be void, and, as to the property so devised, the decedent shall be *deemed to have died intestate.* But this shall not defeat the title of a bona fide purchaser, for value, of the property so devised, who acquired the same after one year from the probation of the will, without notice that the person to whom the same was devised so caused or procured the death of the testator.[7] (emphasis added).

Section 479 was first enacted in the Code of 1892, and in the Codes of 1892, 1906, 1930 and 1942 it was included in the chapter on Descent and Distribution.[8] The same appears to be true as to the lineage of § 672. While the statutes in other states have been held to be constitutional and as such would not result in forfeiture of estates or corruption of blood,[9] there is nothing to indicate that the constitutionality of the Mississippi Code provisions cited above has ever been challenged.

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[1] Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888).

[2] Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908); Riggs. v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

[3] Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 718 (1936).

[4] Whitney v. Lott, 134 N.J. Eq. 586, 36 A.2d 888 (1944).

[5] Wade, *supra* note 3, at 716.

[6] MISS. CODE ANN. § 479 (1956).

[7] MISS. CODE ANN. § 672 (1956).

[8] *See* Henry v. Toney, 217 Miss. 716, 725, 64 So. 2d 904, 906 (1953).

[9] For the usual approach to this solution see Hamblin v. Marchant, 103 Kan. 508, 175 P. 678 (1918).

When read together, §§ 479 and 672 tend to convey the desire of the legislature that in fact the killer *himself* should not take the property at issue either by testate or intestate succession. However, what is left unclear is what legal sanctions, if any, will be applied against any party or parties seeking to acquire the property through or from the killer—in short, does statutory interpretation lend itself to the conclusion that a felonious act, which results in the death of one who has property, will completely cut off the claims of a non-felonious taker who claims the property from the decedent via the killer who may very well be the weak link in the chain? An analysis of this area of law reveals that the answer to this question depends upon three considerations:

> (1) The mode of acquisition of the property involved as it applies to the felonious actor—whether he claims under a will or by intestate succession;
>
> (2) The nature of the property involved;
>
> (3) The interest which the slayer does or did have in the property—whether this interest is vested or contingent.

The first of these considerations is perhaps the easiest with which to deal. Clearly, under the statute, if the slayer seeks to gain any property under a will, such devise or legacy shall be void, and as to any real or personal property involved, the unique[10] wording of § 672 directs that as to such devise or legacy the decedent shall be deemed to have died intestate. Thus where a will is involved, any third party seeking to take the property will be precluded from so doing unless, by reason of the death of the decedent, the killer becomes the decedent's heir or next of kin. In this situation, where there is a family relationship between the slayer and his victim, the rights of any third party are less certain of being abrogated despite the words "never been in being" as used in § 479 creating an inference that the property should go to the other heirs or next of kin of the decedent.[11] While the common law doctrine prohibiting one from profiting by his own wrong was held to apply to the murderer and those claiming under him[12] the application of a strict interpretation of these words will result in gross inequities in certain instances, especially where the third party is a descendant of the slayer. As will be seen below, courts which have considered this problem have taken diametrically opposed views.

The second and third considerations set out above are closely related and may be more advantageously discussed in conjunction. If the victim owned the property in fee simple no real problem is encountered as to the killer acquiring title since his interest under either will or intestate succession is not vested and he is precluded from taking title by the operation of both §§ 479 and 672. However, if the property which the slayer seeks to acquire is an estate by the entireties, such estate being held by the slayer and the murdered spouse by virtue of the unities of time, title, interest, possession, and the marital relationship, the judicial waters become extremely muddied. In this situation disagreement comes to the fore as to whether or not the murderer owns the whole estate after

[10] Wade, *supra* note 3, at 727-28 n.51.

[11] *Id.* at 725 n.43.

[12] Perry v. Strawbridge, *supra* note 2, at 644-45.

the victim's demise. Although the courts of Mississippi have not considered this problem, other courts have and have come to one of four conclusions:

(1) Title vests in the murderer since the nature of the estate governs and the estate vests by operation of law.[13]

(2) Neither legal nor equitable title will vest in the killer since he is deemed unworthy of succeeding to the estate and is considered as predeceasing the victim.[14]

(3) Legal title passes to the killer, but equity, acting in personam, will compel the killer to be a constructive trustee for the heirs or next of kin of the victim and to convey title to them.[15]

(4) The murderer has by his felonious act severed the estate and subsequently he and his victim have become tenants in common, each owning an undivided one-half interest in the property.[16]

Some jurisdictions, including Tennessee, have held that where there is a statute purporting to divest a slayer from any interest in the property of his victim such statute does not apply to a situation where an estate by the entireties is involved.[17] Although involving a different factual background, a recent Mississippi case has held that a tenancy by the entirety in real property cannot be severed or destroyed by the act of one of the tenants.[18] But it would appear that in any case involving a tenancy by the entirety where one spouse has murdered the other, a Mississippi court would still have available to it the other three options discussed previously on which to ground a decision.

Although joint tenancies are not favored in Mississippi, they may be created by the use of specific language in the deed or other instrument[19] and therefore must be considered at this point. Each tenant has equal rights to enjoy the entire property during its existence and the right, in the event of survivorship, to inherit the whole. Basically the situation is resolved in the manner of tenancies by the entirety[20] and even cases involving joint bank accounts have been circumscribed by resort to the rule established in the particular jurisdiction.[21] As to the distribution to be made of the benefits of life insurance policies where such policies were on the joint lives of two persons and one joint tenant killed the other, it appears agreed that the surviving tenant cannot recover the proceeds from the insurance on his victim.[22] This view is in accord with the Mississippi decisions.[23] However, there is a split of au-

[13] Hamer v. Kinnan, 16 Pa. D. & C. 395 (1931); Beddingfield v. Estill, 118 Tenn. 39, 100 S.W. 108 (1906).

[14] Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y.S. 173 (Sup. Ct. 1918).

[15] Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927).

[16] Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951).

[17] Annot., 32 A.L.R.2d 1099, 1106 (1953).

[18] Cuevas v. Cuevas, 191 So. 2d 843 (Miss. 1966).

[19] O'Connor v. Dickerson, 188 So. 2d 241 (Miss. 1966).

[20] Annot., 32 A.L.R.2d 1099, 1101 (1953).

[21] *Id.* at 1108.

[22] *Id.* at 1109.

[23] Gholson v. Smith, 210 Miss. 28, 48 So. 2d 603 (1950); Penn Mut. Life Ins. Co. v. Nunnery, 176 Miss. 197, 167 So. 416 (1936).

thority as to whether the victim's representatives could recover on the policy.[24]

There has been only one case reported involving a slayer's right to property which was held by the victim and the killer as tenants in common.[25] Here the killer and his wife held the property and the court ruled that after the death of both the wife and the slayer's adopted daughter, the wife's interest passed first to the daughter and thereafter, upon the death of the latter, to the slayer. It is submitted that this result could not be reached by a Mississippi court due to the effect of §§ 479 and 672.

A different problem is posed where the killer is either a reversioner or a vested remainderman of an estate held by his victim. Here, where the felonious actor's interest is vested, it is obvious both that the slayer cannot be constitutionally deprived of his property, and that to allow the killer to take would be to allow him to profit by his own wrong. What few cases there have been illustrate that the murderer would take, although at least one case dealing with a defeasible fee holds that the grantor, upon killing the grantee, was precluded from obtaining his reversionary interest under the theory that a murderer cannot take any property interest from his victim.[26]

The Mississippi cases dealing either directly or indirectly with the question of whether or not a third party can acquire property through or from one who has murdered the then present owner of the property are extremely few. The earliest case is *Anderson v. Anderson*[27] which held that there was a strong public policy against a murderer being able to inherit from his victim although nothing was discussed concerning the rights of anyone seeking to take through or from the murderer. Of a similar nature, although life insurance beneficiaries were involved, were the cases of *Gholson v. Smith* and *Penn Mut. Life Ins. Co. v. Nunnery*.[28] The case of *Jones v. Goolsby*[29] concerned the question of whether or not the son of a woman who had not procured a legal divorce and who later married a man who was, along with the woman, killed by the woman's first husband could inherit the whole estate of the woman's second husband. As the son sought to acquire the property through his mother and not through the killer, the case is not in point.

Perhaps the situation most analogous to the problem discussed herein is found in the case of *Henry v. Toney*.[30] This case holds *inter alia* that a husband who feloniously kills his wife can not take the wife's property either by will or by intestate succession even when the felonious event takes place out of state. The court adds that a plea of guilty to a charge of manslaughter is not necessarily conclusive of a "wilful" killing such as would bring the act within the provisions of §§ 479 and 672, but that such a plea could amount to slight evidence or evidence merely that a

[24] *Compare* Spicer v. New York Life Ins. Co., 268 F. 500 (5th Cir. 1920), *with* Merrity v. Prudential Ins. Co., 110 N.J.L. 414, 166 A. 335 (1933).

[25] Smith v. Greenburg, 121 Colo. 417, 218 P.2d 514 (1950).

[26] Annot., 24 A.L.R.2d 1120, 1122 (1952).

[27] 158 Miss. 116, 130 So. 91 (1930).

[28] *See* Gholson v. Smith; Penn Mut. Life Ins. Co. v. Nunnery, *supra* note 23.

[29] 218 Miss. 847, 68 So. 2d 89 (1953).

[30] 211 Miss. 93, 50 So. 2d 921 (1951).

killing had occurred. In a subsequent suit between the same parties,[31] in affirming the lower court's finding that the killing had been wilful and as such barred the claims of both Henry and his mineral grantees against the property of Henry's wife, the court noted that Henry was not deprived of any *vested* right by § 479; he was *disqualified* to take as an *heir*. Since, here, Henry and his grantees sought to acquire property rights by intestate succession, when §§ 479 and 672 are read together with it, the case seems conclusive of the proposition that the killer and those claiming under him cannot acquire property, either by will or by intestate succession when such property is in fee. However, it is submitted that this is not conclusive where any other property interest is involved or where the third party or parties claiming through or from the killer are also related by blood to both the killer and the victim. If the facts in *Henry* were altered so that the victim was the killer's parent instead of his wife and the third parties were the killer's children instead of his mineral grantees, the words "never been in being" in § 479 might be interpreted so as to cut off completely those who were innocent with respect to the felonious act and deprive them of what otherwise would have been their rightful inheritance. This was exactly the situation involved in the case of *Re Norton*[32] where a grandson was precluded from sharing in the estate of his grandmother, his grandmother's sister being preferred as an heir because the grandson's father had killed the grandmother. Here the court interprets the statutory words "if the intestate shall leave no lineal descendants" to mean no "lineal descendants qualified to succeed to the estate of the intestate,"[33] and concludes that since the father was disqualified by virtue of his felonious act, so was his son. The same result could very well be reached by a strict interpretation of the words "never been in being" in § 479 although the words could also be interpreted as merely lifting the killer out of the line of descent and allowing such third party to recover.

A possible solution to this whole problem area, it is urged, would be the substitution of the words "predeceased the victim" for the words "never been in being" in § 479. If this substitution were made it would be a big step in the direction of more certainty of results in cases involving not only property held in fee, but also tenancies by the entirety, joint tenancies, remainders and reversions. This would be in accord with the Restitution Restatement § 187 (2) [34] which provides that in such cases the slayer will be deemed to hold the property in trust for those who would have been the heirs or next of kin if the slayer had predeceased the intestate. Also, it would be in accord with *Bates v. Wilson*,[35] which holds directly opposite to *Re Norton*, and which is submitted to be the better view, such case concluding that the innocent child or descendant should take the representative inheritance to which he or she is entitled. Further, it would be in line with what was indirectly alluded to in the recent case of *Jenkins v. Borodofsky*[36] which, although con-

[31] Henry v. Toney, *supra* note 8.

[32] 177 Ore. 342, 162 P.2d 379 (1945).

[33] *Id.* at 382.

[34] RESTATEMENT OF RESTITUTION § 187 (2) (1937).

[35] 313 Ky. 572, 232 S.W.2d 837 (1950).

[36] 211 So. 2d 874 (Miss. 1968).

cerned with the right of the administrator of a wife who was killed by her husband to renounce the will of the husband, indicated that the court would be disinclined to have the killer's daughter vicariously suffer the penalities which her father would have suffered had he survived his wife after killing her. Finally, and most importantly, it would accomplish the purpose of the legislature in prohibiting a killer from profiting from his crime while at the same time protecting the interests of innocent third parties who might otherwise be deprived of that which would have been theirs had the felonious act not taken place.

Alan E. Michel

Joinder—Joinder of Causes of Action in Mississippi

Introduction

Misjoinder of causes of action may be defined and distinguished as follows:

> Misjoinder of causes of action, or counts, consists in joining, in different counts in one declaration, several different demands —which the law does not permit to be joined—to enforce several *distinct, substantive* rights of recovery: As, where a declaration joins a count in *trespass* with another in *case*, for distinct wrongs—or one count in *tort*, with another in *contract*.
>
> *Duplicity* in a declaration consists in joining, in one and the *same count*, different grounds of action of different natures, or of the same natures, to enforce only a *single* right of recovery. This is a fault in pleading, only because it tends to useless prolixity and confusion, and is therefore only a fault in form.[1]

One of the most unfortunate consequences of legal precedence is a misplaced reverence for the practice of pleading. As society has traditionally been slow to question religious dogma, so courts and practitioners faithfully parrot the rules of this archaic art as if they too had been inscribed in stone tablets. It is submitted that the doctrines of joinder of causes of action have evolved as a professional tradition and are justified solely by the antiquity of their ancestry.

This indifference toward improvements (notably in procedural practice) appears to be a characteristic trait of the legal profession. For when some medical innovation is made, doctors over the entire world know about it and immediately utilize the methods of their contemporaries. However, when procedural reforms are enacted, most courts, legislatures, and practitioners are characteristically indifferent and slow to adopt the reforms. Thus, the machinery of justice plods along, slowly but uninterrupted.

Professor Sunderland has this to say concerning the subject:

[1] J. Gould, A Treatise on the Principles of Pleading in Civil Actions 205 (5th ed. 1887).

> No better illustration of this can be found than the problem of joinder of causes of action. The old rules and the very foundation upon which they rested, if there really were any, have been demolished by modern reformatory legislation. Most of the restrictions which the law placed upon such joinder can be shown by experience to be useless. One jurisdiction has progressed here, another there. But no jurisdiction, excepting perhaps Great Britain and its dominions, has consolidated and assembled the various improvements which have been developed into an enlightened and comprehensive system, nor has there even been any interest shown by the rank and file of American lawyers in studying the operations of new rules in this field.[2] There are still outposts in the old procedural front line trenches, held by devoted courts who worship Chitty and the old regime, but they are isolated and all but surrounded, and their fall is inevitable.[3]

Joinder at Common Law

As a result of the ancient rule of common law that every controversy should be reduced to a single issue, the courts at common law did not allow joinder of causes of actions except in very limited instances. The learned common law judges apparently had as much trouble developing and enunciating the rule as the courts today have in applying it, and though misjoinder would sound the death knell for a plaintiff's case, still the courts could not show him how to avoid the rule. Tidd sets out this perplexing situation.

> In one case, it was said by *Lee,* Ch. J. that the true way to judge of this matter is, that whenever the process and judgment are the same on two counts, they may be joined; otherwise they cannot. But it being found that the similarity of the process afforded but a very fallible criterion, there being the same process of summons, attachment and distress, in actions of *account, covenant, debt, annuity,* and *detinue,* and the same process of attachment and distress in actions of *assumpsit, case,* and *trespass,* none of which can be joined, it was said in a subsequent case, by *Wilmot,* Ch. J. that the true test to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment on both; and if there be, he thought they might be well joined. But in a later case, the court of Common Pleas were of opinion, that the rule or test to try whether two counts can be joined, as laid down in the former one, was rather too large, and not universally true: and the reason for this opinion probably was, that there is the same judgment, for damages and costs, in actions of *assumpsit, covenant, case* and *trespass,* and the same entry of a *misericordia* in the three first of these actions, and yet no two of them can be joined. Therefore, in a still later case, a new criterion was substituted; and it was said by *Buller,* J. to be

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[2] Sunderland, *Joinder of Actions,* 18 MICH. L. REV. 572 (1920).

[3] *Id.* at 575.

> universally true, that wherever the same plea may be pleaded, and the same judgment given, on two counts, they may be joined in the same declaration. But even this rule is not altogether unexceptionable; for it is clear that *case* and *trespass* cannot in general be joined, although the same plea of not guilty of the premises will serve for both, and there is the same judgment in each, for damages and costs: and though in general the judgment in trespass is *quod capiatur*, and in actions upon the *case, quod sit in misericordia*, yet sometimes there is an entry of a *capiatur* in *case*, as well as in *trespass*.[4]

Thus, it was not entirely clear what yardstick would be used in determining joinder, each judge and text writer having his own general rule.

> The *nature* of the causes of action therefore should be attended to, in order to determine whether different counts may or may not be joined in the same declaration . . . it may be safely laid down as a general rule, that where ever the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined, otherwise they cannot.[5]

Chitty, the most revered expounder of common law pleading, states that:

> The result of the authorities is stated to be, that "when the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration; or whenever the counts [sic] are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different . . . they may be joined." Perhaps the latter, that is, the *nature* of the causes of action, is the best test or criterion by which to decide as to the joinder of counts. By this rule we may decide in general what forms of action may be joined in the same declaration.[6]

Therefore, it appears that at common law there were four requisites for proper joinder of several causes of action:

1. Each cause of action must be of the same nature,[7]
2. Each cause of action must exist between all the parties,
3. Each cause of action must accrue to the plaintiff in the same right, and
4. Each cause of action must exist against the defendant in the same capacity.[8]

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[4] 1 TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 11 (4th Am. ed. 1856).

[5] *Id.* at 12.

[6] 1 CHITTY, A PRACTICAL TREATISE ON PLEADING 222 (16th Am. ed. 1843).

[7] "By causes of action 'of the same nature,' are here meant such as require, at common law, the same *judgment*, viz. a *capiatur* [arrest] or a *misericordia* [a fine]." J. GOULD, *supra* note 1, at 196.

[8] *Id.* Thus an executor could not join a promise made by a defendant to his testator and one made by defendant to himself personally.

The logical interpretation of these rules leads us to the conclusion that numerous claims by a plaintiff could be joined in different counts against a defendant if the claims were within a certain form of action even though the claims arose out of varied factual situations occurring at diverse times. To the contrary, if the claims arose out of the same transaction or factual situation but fell under different forms of action, they could not be joined. Thus, the controlling factor was the legal similarity of the claim rather than the occurrence of events.[9] Evidently, the common law courts reasoned that the jury could decipher multiple and/or conflicting factual issues but would be confused by the complexity of diverse legal issues in one suit. In the words of Stephen:

> The twelve men are commonly rude and ignorant, and so consequently, not proper to be troubled with too many things at once.[10]

Misjoinder was a serious and fatal error going to the very core of the plaintiff's case. The defendant via a demurrer, a motion in arrest of judgment after the verdict, or by writ of error, could in effect render capital punishment to the plaintiff's declaration.[11]

When a misjoinder was declared the court would usually give the plaintiff leave to amend by striking the misjoined counts.[12]

A Chronological Synopsis of Mississippi Decisions on Joinder

The predecessor[13] to the modern Mississippi Code section[14] which enumerates the present requisites of a declaration was enacted as early as 1880. This provision which was said to have abolished all forms of actions[15] declares that:

> The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contains sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; *and it shall not be an objection to maintaining any action that the form thereof should have been different.*[16] (emphasis added).

In this area, *Town of Hazlehurst v. Cumberland Tel. & Tel. Co.*[17] is the earliest Mississippi decision of major import; evidently it is still viable today since it was cited with approval as late as 1958.[18]

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[9] C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 436 (2d ed. 1947).

[10] STEPHEN ON PLEADING 1v n.57 (Tyler ed. 1871).

[11] J. GOULD, *supra* note 1, at 204; J. CHITTY, *supra* note 6, at 228.

[12] J. CHITTY, *supra* note 6, at 229.

[13] MISS. CODE § 1536 (Campbell 1880).

[14] MISS. CODE ANN. § 1464 (1956).

[15] Evans v. Miller, 58 Miss. 120 (1880).

[16] MISS. CODE ANN. § 1464 (1956). The emphasized portion was the part referred to as abolishing all forms of action in Evans v. Miller, *supra* note 15. However, this statement was dicta.

[17] 83 Miss. 303, 35 So. 951 (1903).

[18] Stringer v. Consumers Credit Corp., 234 Miss. 240, 245, 105 So. 2d 756, 757 (1958).

In *Hazlehurst* the city sued defendant company for use of the city's streets predicating liability on either a breach of contract or the value of the use of the streets. The object of framing the declaration in such a manner is obvious: the city did not know whether there was a valid contract or not. Thus, by alleging both contract and tort in the declaration, if the contract were held valid, then the city would be entitled to damages; if the contract were not valid then the city could recover a reasonable sum for the use of the streets.

The Mississippi Supreme Court summarily dismissed the plaintiff's contentions that according to statute[19] the declaration showed a good cause of action and that it was no objection that the form should have been different. The court simply said, and I quote the entire decision:

> The first count of the declaration is on a cause of action distinctly *ex contractu*. The second is on one distinctly *ex delicto*. Here is, therefore, a misjoinder of causes of action, and a general demurrer to the whole declaration was properly sustained. [Citation omitted]. Our code does not change this. Since this itself disposes of the case before us, we do not decide other questions raised.[20]

This case was probably the most important decision concerning Mississippi pleading in this century, for here the court had an unparalleled opportunity to bury forever the forms of action. The recently enacted code provision and dicta in *Evans v. Miller*[21] gave adequate grounds to do so. However, the court allowed the ghosts of the common law writs to continue haunting Mississippi practitioners and to pre-occupy the rulings of Mississippi courts for at least another century.

Following the chronological sequence, the next case to face the Mississippi court was *Illinois C. R.R. Co. v. Abrams*.[22] In this case, plaintiff in *one count* sued for injuries arising out of his employment, predicating liability on the employer's failure to provide a safe place to work and the negligence of a fellow employee.

Although the defendant did not interpose a demurrer to the declaration, the court held that the joining of the alleged antagonistic causes of action in one count was reversible error. However, this specific problem has apparently been settled in *Keystone Lumber Yard v. Yazoo and M. V. R.R.*[23] wherein it was said that if there was no demurrer presented to or passed on by the lower court joining antagonistic causes of action, the supreme court will not raise the issue. Still, the larger problem of when or if two "antagonistic causes" can be joined was not resolved there, but will be discussed in conjunction with the following cases.

In *Yazoo and M. V. R.R. v. Wallace*,[24] the plaintiff was injured while discharging his duty as a brakeman for defendant. Plaintiff alleged

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[19] Miss. Code Ann. § 671 (Thompson, Dilliard & Campbell 1892).

[20] Town of Hazlehurst v. Cumberland Tel. & Tel. Co., *supra* note 17, at 305, 35 So. at 951.

[21] Evans v. Miller, *supra* note 15.

[22] 84 Miss. 456, 36 So. 542 (1904).

[23] 94 Miss. 192, 199, 47 So. 803, 804 (1908).

[24] 90 Miss. 609, 43 So. 469 (1907).

that the road bed was defective, the platform upon which he stood to signal the engineer was improperly constructed, and that the engine was operated by one not trained for that purpose.

Again, the court struck down the declaration stating: "The demurrer to the declaration should have been sustained. Antagonistic causes of action should not be allowed *in one count.*"[25] (emphasis added).

As in *Abrams*, the court mentioned the fact that the antagonistic causes were stated in one count but *Town of Hazlehurst v. Cumberland Tel. & Tel. Co.*[26] held that even if antagonistic causes were in two counts, still the declaration would be defective.

Although it appears from cursory examination that these cases stand for the proposition that antagonistic causes may never be joined, it is submitted that there are salient distinctions in *Abrams* and *Wallace* as contrasted to *Hazlehurst*. In *Hazlehurst*, the city was unsure whether their action should be framed in tort or contract. But in *Wallace* and *Abrams*, a breach of the contract, i.e., duty to furnish a safe place to work, was combined with an act of negligence (negligence of a fellow servant in *Abrams* and negligence in constructing the road bed plus negligence in permitting an incompetent person to operate the engine in *Wallace*) to produce a single injury. Thus, in *Abrams* and *Wallace* where the court held that antagonistic causes of action could not be joined in one count, both a breach of contract and negligence arising as a result of two independent acts contributed to the injury. By contrast, in *Hazlehurst* there was but a single act which could be brought on either of two theories of action. Therefore, if one accepts this hypothesis as accurate, it logically follows that if the declaration in *Abrams* and *Wallace* had been framed in two counts, they would not have been subject to a demurrer.

The rationale of how these and the subsequent cases can be reconciled has never before been advanced and is submitted strictly as opinion. However, this reasoning does find some support in *Brown v. Mississippi C. R.R.*[27] wherein the declaration charged that the plaintiff was injured while riding on the first defendant's train, said defendant owing a duty to plaintiff arising out of a contract to safely convey him to his destination, and further charged the second defendant with wrongfully obstructing the tracks causing the train to be derailed, thereby injuring the plaintiff.[28] Here the court held that the declaration did not charge two inconsistent causes of action since the act of each defendant contributed to the wrong. However, both allegations were framed in one count. This aspect is easily distinguished by the fact that in this case there were two defendants, each charged with a single form of action. Still it is important to note that the court allowed two antagonistic causes of action (tort and contract) to be joined in one suit.

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[25] *Id.* at 615, 43 So. at 470.

[26] 83 Miss. 303, 35 So. 951 (1903).

[27] 144 Miss. 326, 109 So. 796 (1926).

[28] Evidently the two railroad companies were having a dispute over the ownership of a certain part of the tracks, and one locked a switch causing the derailment.

Home Ins. Co. v. Tate Mercantile Co.[29] was a factual rerun of *Hazlehurst.* Here the plaintiff procured insurance on his mercantile inventory from defendant. During the life of this insurance, plaintiff's warehouse burned and defendant was notified that unless quick adjustment was made, irreparable injury would be inflicted on plaintiff's business and credit. Plaintiff alleged that defendant's agent seized upon this opportunity of compelling plaintiff to accept a lesser sum in settlement, and that the settlement was agreed upon on the condition that it be paid at once. Moreover, a contract for immediate payment was duly entered into and the defendants willfully refused to comply with this contract and by such refusal plaintiff was forced into bankruptcy and his credit destroyed.

Defendant demurred setting out a misjoinder of causes of action (one *ex contractu* and one *ex delicto*) whereby plaintiff amended his declaration and recovered damages arising out of a breach of contract. In the instant case, brought subsequently, plaintiff sued for damages arising out of defendant's tortious conduct and defendant plead *res judicata.*

The court, in upholding defendant's plea, said:

> One having a cause of action for damages arising from a breach of contract, and which cause of action at the same time constitutes a wrong for which the plaintiff may waive the contract and sue in tort, the plaintiff has two courses . . . . He may sue in contract for the damages . . . or he may waive the contract and sue in tort . . . . [And in one suit] because for one cause of action but one suit is given . . . .[30]

Thus, as previously stated, where defendant has committed but one wrongful act, the plaintiff must elect upon which theory he will sue.

In *Hall v. Stokley,*[31] only the procedural facts were set out, thus limiting our examination of the case factually. This appears to be the only case wherein a plaintiff in one suit received the cumulative effect of *Abrams*[32] and *Hazlehurst.*[33] In plaintiff's original declaration, two antagonistic causes of action were joined in one count. A demurrer was sustained under the rule of the *Abrams* case. On leave to amend, the plaintiff then filed his declaration in two counts, one *ex delicto* and one *ex contractu,* thus falling under the prohibition of *Hazlehurst.* Again the lower court sustained the demurrer but this time dismissed the plaintiff's case. On appeal the Mississippi Supreme Court reversed, stating their preference for a trial on the merits and ruled that although the privilege of allowing amendments was largely a matter of sound judicial discretion which is vested in the trial judge, only in exceptional cases should amendments be refused.

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[29] 117 Miss. 760, 78 So. 709 (1917).

[30] *Id.* at 769, 78 So. at 711.

[31] 156 Miss. 673, 126 So. 475 (1930).

[32] 84 Miss. 456, 36 So. 542 (1904).

[33] 83 Miss. 303, 35 So. 951 (1903).

Early in 1938, *Southeastern Express Co. v. Namie*[34] arrived to further confuse Mississippi practitioners. The plaintiff in this case had delivered a number of skunk pelts to a common carrier for transportation to St. Louis. Upon arrival it was discovered that approximately three quarters of the pelts were damaged, and plaintiff sued, sounding his declaration in tort, i.e., negligence in storing the pelts too close to hot water pipes in the boxcar.

Upon trial of the issues, however, plaintiff failed to prove any negligence. Nevertheless, the court declared that:

> [W]hen plaintiff has alleged and proved the facts essential to recovery, he is entitled to judgment. It follows that it is unnecessary to allege or prove more, and that if more than enough be alleged, the unnecessary allegation will be treated as surplusage.[35]

Thus a futile attempt to prove surplusage will not defeat plaintiff:

> [f]or having alleged and proved enough he is not to lose his case merely because he alleged but failed to prove more than enough. Under our statutes abolishing forms of action and requiring that merits only shall be considered, Section 521, Code 1930, the rule goes so far that a recovery may be had in contract if the allegations and proof support such a right, although the declaration sounded in tort.[36] (citations omitted).

The next two cases[37] appearing before the Mississippi Supreme Court concerning misjoinder of causes of action involved the issue of eminent domain and are distinguishable on that basis, but they nevertheless reinforce the contentions earlier made that where two separate acts combine to inflict one injury, the plaintiff can plead "antagonistic causes of action" in the declaration.

In *City of Meridian v. Sullivan*[38] plaintiff predicated his declaration in trespass (charging that the defendant city broke a hole in the top of plaintiff's culvert causing drainage water to undermine plaintiff's buildings) and tort (negligence in failing to keep its culverts free from obstructions thereby causing increased damages).

The Mississippi Supreme Court held that the joinder was proper, saying:

> Since both acts combine to make up one complete result, and since the result could not have been attained without the concurrence of both acts . . . .[39]

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[34] 182 Miss. 447, 181 So. 515 (1938).

[35] *Id.* at 460, 181 So. at 516.

[36] *Id.*

[37] McDowell v. City of Natchez, 242 Miss. 386, 135 So. 2d 185 (1964), is a corollary case decided in 1961 on the basis of the following cases: City of Jackson v. Cook, 214 Miss. 201, 58 So. 2d 498 (1952); City of Meridian v. Sullivan, 209 Miss. 61, 45 So. 2d 851 (1950).

[38] 209 Miss. 61, 45 So. 2d 851 (1950).

[39] *Id.* at 69, 45 So. 2d at 853.

City of Jackson v. Cook[40] contained essentially the same factual situation as *City of Meridian*. The holding simply reiterated the fact that the two charges or causes were not antagonistic, and added the basis that the negligence charge was "simply an enlargement of the charge of damage without negligence."[41]

The decision offered further support to the submitted theory of joinder under the *Abrams* rule. The court in discussing *Abrams* said:

> In the *Abrams* case the declaration, in one count, grounded the action upon an unsafe place to work and negligence of a fellow servant. The court also remarked that the allegations were vague and indefinite. As to the two stated grounds the court said they constituted "antagonistic causes of action under this peculiar declaration." [84 Miss. 456, 36 So. 543] and *indicated the grounds should have been stated in two counts instead of one.*[42] (emphasis added).

A reading of the *Abrams* case will show that the court there made no such intimation. It is submitted that the Mississippi court in this quote from *City of Jackson* was, in a salient manner, stating that antagonistic causes could be joined in the same declaration when they arose from separate, independent acts.

Nasif v. Booth[43] and *Stringer v. Consumers Credit Corp.*[44] both concerned actions wherein the plaintiff alleged both tort and contract in his declaration. These cases fall under the principle of the *Hazlehurst* case, i.e., the respective plaintiffs were unsure whether the proof would sustain a finding under a theory of tort or contract, so they plead both. As contrasted to *Abrams* and the cases which resulted from its rule, where there were two distinct acts that concurred to produce one injury, in *Nasif* and *Stringer*, the alleged negligence arose out of the breach of contract.

Hazell Machine Co. v. Shahan[45] is relevant because of its discussion of the difference in causes *ex contractu* and *ex delicto*. Quoting 1 Am. Jur. 2d *Actions* §§ 8, 9, (1962) the court stated:

> Actions at law of a personal nature may be in form, either ex contractu—that is, based upon contract—or ex delicto—based upon tort. Although there is a broad distinction between causes of action arising ex contractu and those arising ex delicto, and a mere matter of contract cannot be converted into a tort, the dividing line between breaches of contract and torts is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way, a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties, whereas

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[40] 214 Miss. 201, 58 So. 2d 498.

[41] *Id.* at 208, 58 So. 2d 501.

[42] *Id.* at 207, 58 So. 2d at 500.

[43] 221 Miss. 126, 72 So. 2d 440 (1954).

[44] 234 Miss. 240, 105 So. 2d 756 (1958).

[45] 249 Miss. 301, 161 So. 2d 618 (1964).

> the tort, ordinarily, is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of, or coincident with, a contract, and frequently the same facts will sustain either class of action.
>
> The determination of whether an action is on contract or in tort requires knowledge of the source or origin of the duty . . . . An action ex contractu only, and not an action sounding in tort, can be maintained for a mere failure to perform a contract . . . if the cause of complaint is an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, will not give rise to any cause of action, then the action is founded upon contract, and not upon tort . . . .
>
> See also 1 C.J.S. Actions § 32, to the same effect, and Savage v. Prudential Life, 154 Miss. 89, 121 So. 487. There was no duty owed to appellee by appellant fixed by law and independent of the contract. In fact, the duties due the appellee by the appellant, and vice versa, arose directly from the contract. Hence, there is no merit in appellant's contention of a misjoinder of actions.[46]

Summary

Proceeding on the hypothesis that the foregoing analysis of cases is legally sound, it appears that the rule for joinder of causes of action in Mississippi can be stated as follows:

1. When a plaintiff is not sure what the proof will show but can base his action on either of two causes of action that were antagonistic at common law, there can be no joinder.

2. However, when the defendant has committed two distinct acts, each of which gives rise to a separate cause of action, and these two acts concurred or contributed to the injury inflicted on the plaintiff, then these causes may be joined in one declaration, in separate counts.

Simply stated, where two distinct acts, which give rise to two different theories of action, concur to produce a single injury, the causes may be joined. However, where a single act which can be brought under either of two theories injures a plaintiff, the plaintiff may not allege both theories, but must elect under which theory his suit will be prosecuted. However, *Southeastern Express Co. v. Namie*[47] declares that if the plaintiff pleads one theory but the proof shows another, still the plaintiff may recover.

Conclusion

Although the common law rule of joinder of causes of action is deeply rooted in legal precedence, precedence alone is not sufficient justification for the rule. From its inception the rule was never clearly

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[46] *Id.* at 317-18, 161 So. 2d at 623.

[47] 182 Miss. 447, 181 So. 515 (1938).

stated and understood, and each attempt at clarification only compounded the confusion. Even the magistrates who enunciated the rule were unable to define it sufficiently so that unwary plaintiffs and lawyers might avoid it and its inequitable effects.

It is submitted that the perpetuation of this rule, the sole excuse for the continued existence of which is its antiquity of ancestry, ill serves the practice of pleading in Mississippi and that the injustice caused by the operation of the rule is not justified by whatever beneficial effect it may have. Mississippi should follow the lead of many other jurisdictions which have launched an assault on the citadel of joinder by emphasizing the trial of cases on their merits, not on the niceties and technicalities of pleading.

Rufus Eugene Parker

RECENT BOOKS

THE LIQUIDATION REINCORPORATION PROBLEM: A RUNNING TAX BATTLE

James O. Hewitt and James A. Cuddihy

New York: The Journal of Taxation, Inc., 1969. Pp. 225.

This book deals with some of the federal income tax problems involved when a corporation is liquidated and its assets or some of them end up in another or new corporation, either (a) by the old corporation being dissolved, its assets distributed to its stockholders in exchange for their stock and the assets or some of them sold by the stockholders to another corporation; or (b) by one corporation selling its assets in a corporate income tax-free or partially tax-free liquidation (e.g., a 1954 IRC § 337 liquidation) and then distributing to its stockholders in exchange for their stock the resulting cash and remaining properties not sold; or (c) by the stockholders of the old corporation selling their stock therein to another corporation, and the other corporation then liquidating the old corporation for the latter's assets. In any of these situations problems arise because at least some of the stockholders of the old corporation have taken a substantial equity interest in the other or surviving corporation; and, because under the Internal Revenue Code, the gain on distributions in complete and partial liquidations of corporations in exchange for stock is taxed as capital gain, whereas distributions of accumulated and current earnings and profits through dividends or the gain on "boot" (i.e., distributions of money or property in the course of the reorganization of the corporation) are taxes as ordinary income at ordinary rates. Some of the resulting tax problems dealt with in this book are: (1) the circumstances under which accumulated earnings and profits of the corporation, reflected in the assets distributed, will be treated as ordinary income (i.e., as dividends or gain on "boot") or as capital gains (i.e., liquidating distributions); (2) whether the other or new corporation obtained the assets in such a manner (e.g., by purchase) that it will have a stepped-up basis upon liquidation for future depreciation or sale purposes; or, on the other hand, that it will have the same or transferred basis therein which the old corporation had (e.g., as a result of a reorganization).

This book is a thorough study of the above described and other tax problems by two well known and capable lawyers in the taxation field; however, the book will be helpful only to those lawyers who have some prior knowledge of federal tax law. It is not a book for a lawyer

who handles only an occasional, simple tax matter. It is a well done historical explanation and analysis, with comments and observations by the authors, of the development of liquidation-reincorporation problems from the Revenue Act of 1924 to date.

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Warren V. Ludlam, Jr.
Jackson, Mississippi

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